154 U.S. 256

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1893.**

No. 892.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL, AND JARVIS MASTERS, PLAINTIFFS IN ERROR,

*vs.*

FRANK D. STURGES, AS RECEIVER OF SCHUYLER'S STEAM TOW-BOAT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

**FILED FEBRUARY 18, 1893.**

**(15,262.)**

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, in the county of Albany, before you or some of you, upon remittitur from the court of appeals, being the highest court of law or equity of the said State in which a decision could be had in a certain proceeding entitled "In the matter of the application of a majority of the trustees of Schuyler's Steam Tow-boat Company, a corporation, for its dissolution," upon the petition of Frank D. Sturges, as receiver, against Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters, impleaded with others, for a perpetual injunction to stay proceedings *in rem* in the district court of the United States for the eastern district of New York, in admiralty, wherein a title, right, privilege, and immunity was claimed by them under the Constitution and statutes of the United States and the decision was against the title, right, privilege, and immunity claimed by them under such Constitution and statutes, a manifest error hath happened, to the great damage of the said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters, as by their complaint doth appear, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you,

2 if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 28th day of February next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, the 31st day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

The foregoing writ allowed by me January 31, 1893.

SAM'L BLATCHFORD,
*Associate Justice of the Supreme Court of the United States.*

3 [Endorsed:] Supreme court of the State of New York. In the matter of the application of the trustees of Schuyler's Steam Tow-boat Company for its dissolution. Writ of error. Car-

penter & Mosher, attorneys for pl'ffs in error, 62 Wall street, New York city. Service this day of a copy of the within is admitted. Dated N. Y., —— —, 189–.

SIR: Please take notice that a —, of which the within is a copy, made in the within-entitled cause, was this day — in the office of the clerk of the —, at the county court-house, in the city of ——. Dated —— —, 189–.

Yours, &c., CARPENTER & MOSHER,
*Attorneys for* ——.

4 N. Y. Supreme Court, County of Albany.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

Know all men by these presents that we, Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters, all of the city of Brooklyn, county of Kings and State of New York, as principals, and John Winslow and Hermann H. Tajen, as sureties, are held and firmly bound unto Frank D. Sturges, as receiver of Schuyler's Steam Tow-boat Company, in the sum of one thousand dollars, to be paid to the said Frank D. Sturges as receiver as aforesaid; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 20th day of January, A D. 1893.

Whereas the above-named principals have sued out or are about to sue out a writ of error from the Supreme Court of the United States to reverse the judgment entered in the county of Albany in the above-entitled suit or proceeding, entered December sixth, 1892,

5 affirming an order of said court entered February 8, 1892, which order enjoined and restrained the above-named principals and others therein named from further prosecuting certain libels in the district court of the United States for the eastern district of New York and awarded against them one hundred and fifty-three (153) dollars, costs and disbursements:

Now, therefore, the condition of this obligation is such that if the above-named principals shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, and, moreover, shall pay the amount of costs, damages, and interest awarded and to be awarded in case the said judgment shall be affirmed by the Supreme Court of the United States, then this obligation to be void; otherwise to remain in full force and effect.

| | | |
|---|---|---|
| (S'd) | MICHAEL MORAN. | [SEAL.] |
| (S'd) | PETER CAHILL. | [SEAL.] |
| (S'd) | CYNTHIA JANE CAHILL. | [SEAL.] |
| (S'd) | JARVIS MASTERS. | [SEAL.] |
| (S'd) | JOHN WINSLOW. | [SEAL.] |
| (S'd) | HERMANN H. TAJEN. | [SEAL.] |

Sealed and delivered and taken and acknowledged this twentieth day of January, A. D. 1893, at the city of New York, before me—

[SEAL.] (S'd) ALBERT A. WRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
*City and County of New York,* } ss:

6 John Winslow and Hermann H. Tajen, being severally duly sworn, say—the said John Winslow that he resides at No. 282 Carroll street, in the city of Brooklyn, and that he is a freeholder in the State of New York, and the said Hermann H. Tajen that he resides at No. 118 Atlantic avenue, in the city of Brooklyn, and is a householder in said State of New York, and each for himself says that he is worth the sum of two thousand dollars over and above all debts that he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

(S'd) JOHN WINSLOW.
(S'd) HERMANN H. TAJEN.

Sworn to before me this 20th day of January, 1893.

[SEAL.] (S'd) ALBERT A. WRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

Approved by—
—— ——.

The foregoing bond is approved as to form and amount and sufficiency of sureties.

January 31st, 1893.

(S'd) SAMUEL BLATCHFORD.
*Associate Justice of the Supreme Court of the United States.*

7 [Endorsed:] Supreme court, county of Albany. In the matter of the application of the trustees of Schuyler's Steam Tow-boat Company for its dissolution, &c. Copy. Supersedeas bond in behalf of Michael Moran *et al.* Carpenter & Mosher, attorneys for pl'ffs in error, 62 Wall street, New York city. Service this day of a copy of the within is admitted. Dated N. Y., —— —, 189–.

SIR: Please to take notice that a —, of which the within is a copy, made in the within-entitled cause, was this day — in the office of the clerk of the —, at the county court-house, in the city of——.

Dated —— —, 189–.

Yours, &c., CARPENTER & MOSHER,
*Attorneys for*——.

8 UNITED STATES OF AMERICA, *ss:*

To Frank D. Sturges, as receiver of Schuyler's Steam Tow-boat Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on February 28th, 1893, pursuant to a writ of error filed in the office of the clerk of the county of Albany, wherein Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, an associate justice of the Supreme Court of the United States, this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-three.

SAM'L BLATCHFORD, *A. J. S. C.*

9 SOUTHERN DISTRICT OF NEW YORK, } *ss:*
*City and County of New York,* }

Charles D. O'Connell, being duly sworn, says that he is of full age and a clerk in the office of Carpenter & Mosher, attorneys and counsellors, New York city; that on the second day of February, 1893, at No. 71 Wall street, in the city of New York, he served the foregoing citation upon Frank D. Sturges, Esq., personally, by then and there delivering to and leaving with him, personally, a copy of said citation and at the same time showing him the foregoing original citation and the signature of the justice thereunto subscribed.

Deponent further says that he knew the person so served as aforesaid to be the person named and described in said citation, to whom it is addressed and directed.

C. D. O'CONNELL.

Sworn to before me this 2nd day of February, 1893.

[Seal Albert A. Wray, Notary Public, Kings County.]

ALBERT A. WRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

10 [Endorsed:] Supreme Court of the United States. Michael Moran *et al.*, pl'ffs in error, *vs.* Frank D. Sturges, as receiver, &c., def't in error. Citation. Carpenter & Mosher, attorneys for pl'ffs in error, 62 Wall street, New York city. Service this day of a copy of the within is admitted. Dated N. Y., —— —, 189–.

SIR: Please to take notice that a —, of which the within is a copy, made in the within-entitled cause, was this day — in the office of the clerk of the —, at the county court-house, in the city of ——.

Dated, —— —, 189–.

Yours, &c, CARPENTER & MOSHER,
*Attorneys for* ——.

11 STATE OF NEW YORK, *ss*:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 29th day of November, in the year of our Lord one thousand eight hundred and ninety-two, before the judges of said court.

Witness the Hon. Robert Earl, chief judge, presiding.

GORHAM PARKS, *Clerk*.

Remittitur, Dec'r 1st, 1892.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY for its Dissolution, &c.

Be it remembered that on the 16th day of September, in the year of our Lord one thousand eight hundred and ninety-two, Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters, the appellants in this action, came here into the court of appeals, by Carpenter & Mosher, their attorneys, and filed in the said court a notice of appeal and return thereto from the order of the general term of the supreme court.

And Frank D. Sturgis, as receiver, etc., the petitioner and respondent in said action, afterwards appeared in said court of appeals, by James W. Eaton, his attorney; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Joseph F. Mosher, of counsel for the appellants, and by Mr. James W. Eaton, of counsel for the respondent, and
12 after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from in this action to this court be and the same is affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
*Clerk of the Court of Appeals of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE, *Dec.* 1*st*, 1892.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] GORHAM PARKS, *Clerk*.

13 Court of Appeals.

On appeal from third department.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT CO., a Corporation, for its Dissolution.

*Papers on Appeal of Michael Moran and Others from Order Affirming Order of Injunction.*

Carpenter & Mosher, attorneys for appellants; James W. Eaton, attorney for respondent.

14 New York Supreme Court, Albany County.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

Upon the petition heretofore and on the 1st day of August, 1891, filed herein, and upon all the proceedings subsequently had thereunder, and upon the petition of Frank D. Sturges, duly verified on the 10th day of November, 1891, with the affidavits thereto annexed—

It is ordered that Michael Moran, Peter Cahill, Cynthia Cahill, Jarvis Masters, The Lehigh Valley Coal Company, The Lehigh Valley Railroad Company, Henry C. Pratt, Henry D. Craig, Harvey S. Temple, William Moore, James A. Ackley, Byron Boyle, Charles H. Craig, Henry Becking, Richard F. Howard, Sherman M. Ward, Charles McEwan, Peter Dollard, Frederick H. Boyle, John Curry, John McCann, George Ward, William Reynolds, Walter Lewis, Neil Harrigan, Sylvester Shook, Augusta Giligan, Ephraim Travers, Charles Van Wormer, George Baur, Thomas Keese, George Nichols, John Lilis, Anna Harden, William Cheney, Pat-
15 rick Joy, Patrick Donegan, Martin Cheney, Daniel Mahan, Thomas H. Clinton, Alfred V. S. Craig, Charles D. Vrooman, Nelson Mull, John Murphy, Susan Clough, Joseph H. Pratt, Levy Kilmer, Warren Welsh, Edward A. Theis, Peter Biglam, James Costello, Edward Fitzgerald, Thomas Welsh, Thomas Stack, John Lyons, James Mahoney, John Hughes, William Waltar, John Schemmerhorn, Alice Bush, William Larabee, Patrick Blake, Franklin Frisbie, William Tonk, Howard Cuniff, Arthur Spoor, Philips Price, William R. Vandesen, George Miller, George Blenchard, Joseph Holland, Peter Fredenburgh, Moses B. Briggs, James Parsons, Patrick Brophy, August Grill, Edward Downing, Merrick Lawrence, Jeremiah P. Robinson, Isaac R. Robinson, Elizabeth D. Leonard, Harriet W. R. Leech and John Oliver, and each of them, and their and each of their attorneys and proctors, show cause at a special term of the supreme court of the State of New York to be held at the court-house in the city of Kingston on the 14th day of November, 1891, at ten o'clock in the forenoon of that day, why they and each of them should not be enjoined and restrained from

taking any further proceedings in the actions in the United States district court for the eastern district of New York, in which libels have been filed by or on behalf of said parties; and also enjoined and restrained from further prosecuting said libels and each and all of them, and from taking any proceedings looking to the condemnation or sale of said steamboats or any of them; and in the meantime, and until the hearing upon the return of this order to show cause, the said Michael Moran, Peter Cahill, Jarvis Masters, The Lehigh Valley Coal Company, Henry C. Pratt, Henry D. Craig, Harvey S. Temple, William Moore, James A. Ackley, Byron Boyle, Charles H. Craig, Henry Becking, Richard F. Howard, Sherman M. Ward, Charles McEwan, Peter Dollard, Frederick H. Boyle, John Curry, John McCann, George Ward,
16 William Reynolds, Walter Lewis, Neil Harrigan, Sylvester Shook, Augusta Giligan, Ephraim Travers, Charles Van Wormer, George Baur, Thomas Keese, George Nichols, John Lilis, Anna Harden, William Cheney, Patrick Joy, Patrick Donegan, Martin Cheney, Daniel Mahan, Thomas H. Clinton, Alfred V. S. Craig, Charles D. Vrooman, Nelson Mull, John Murphy, Susan Clough, Joseph H. Pratt, Levy Kilmer, Warren Welsh, Edward A. Theis, Peter Biglan, James Costello, Edward Fitzgerald, Thomas Welsh, Thomas Stack, John Lyons, James Mahoney, John Hughes, William Walter, John Schemmerhorn, Alice Bush, William Larabee, Patrick Blake, Franklin Frisbie, William Tonk, Howard Cuniff, Arthur Spoor, Philips Price, William R. Vandesen, George Miller, George Blenchard, Joseph Holland, Peter Fredenburgh, Moses B. Briggs, James Parsons, Patrick Brophy, August Grill, Edward Downing, Merrick Lawrence, Jeremiah P. Robinson, Isaac R. Robinson, Elizabeth D. Leonard, Harriet W. R. Leech, and John Oliver, and their and each of their attorneys and proctors, are hereby enjoined and restrained from taking any further action whatever under the said libels, and from taking any proceedings looking to the condemnation and sale of said steamboats or any of them. Service on or before Nov. 12th, 1891, shall be sufficient.

Albany, N. Y., Nov. 11th, 1891.

E. L. FURSMAN, *J. S. C't.*

17 New York Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

To the supreme court:

The petition of Frank D. Sturges, receiver of Schuyler's Steam Tow-boat Company, respectfully shows:

I. That heretofore, and on the 31st day of July, 1891, the trustees of Schuyler's Steam Tow-boat Company, a corporation created and existing under and by virtue of the laws of the State of New York, presented to this court their petition, duly verified, with the schedules thereto attached, as prescribed by law, wherein they

prayed for the dissolution of said corporation and the appointment of a temporary receiver of its property.

II. That upon said petition, due notice of the application being given to the attorney general of the State of New York, an order of reference was on said July 31st made to John A. Delehanty, Esq., of the city of Albany, and requiring all persons interested in said corporation to show cause before him at his office, in the city of Albany, on the 16th day of November, 1891, why said corporation should not be dissolved, and that in and by said order your petitioner was duly appointed temporary receiver of the property of said corporation, with all the powers and subject to all duties
18 as prescribed by section 1788 of the code of civil procedure. That said order further provided for the publication thereof, and for the execution and filing of the receiver's bond; to which petition and order reference is made for ther contents. (A copy of said order is hereto annexed.) That said petition and order were duly filed and entered in the office of the clerk of Albany county, on the 1st day of August, 1891, and on the same day served on the attorney general.

III. That on the 4th day of August, 1891, your petitioner's bond as such receiver, duly approved by one of the justices of this court, was also filed in the office of said clerk, and your petitioner thereupon entered into and upon the discharge of his duties as such receiver.

IV. And your petitioner further shows, that said petition and order were filed and entered in the office of the clerk of Albany county, and served upon the attorney general of the State of New York, on the forenoon of the 1st day of August, 1891, and that your petitioner's bond as such receiver, duly approved by a justice of this court, was filed in the office of the clerk of said county, at 9 o'clock on the morning of the 4th day of August, 1891: all of which appears by the affidavit of James W. Eaton, Esq., annexed.

Your petitioner further shows, that among the property of said corporation are the steamboats "America," "Belle," "Syracuse," "C. Vanderbilt," "Niagara" and "Jacob Leonard."

That in the afternoon of the 1st day of August, 1891, Michael Moran, of the city of New York, with knowledge that a receiver had been appointed of said corporation, caused libels to be filed in the district court of the United States for the eastern district of New York against said steamboats "Syracuse," "Belle" and
19 "Niagara," under which libels on said day process was issued to the marshal of said district, who thereupon claimed to seize and take into possession said steamboats, and affixed his notice of seizure thereto.

VI. That on August 3d, 1891, said Michael Moran caused libels to be filed in said district on his own behalf, and on behalf of Jarvis Masters, Peter Cahill and Cynthia Cahill, against said steamboats "Niagara," "Syracuse" and "Belle," and also against the said steamboats "C. Vanderbilt," "Jacob Leonard" and "America," claiming in all of said libels liens against said steamboats for services alleged to have been rendered in the years 1890, 1891; that process was also

issued under said libels so filed on the 3d day of August, 1891, under which the said marshal claimed to seize and take into his possession said steamboats, and said marshal affixed his notice of seizure thereto.

VII. That, after said libels had been filed, said Moran stated to your petitioner that before any of said libels were filed he knew that a receiver of said corporation had been appointed, and that he did not intend to be prevented from enforcing his liens, as he had been prevented in a similar case which recently occurred, where a receiver had been appointed; and that said Moran is prosecuting said libels, and proposes, through his proctors, Messrs. Carpenter & Mosher, of the city of New York, to obtain decrees thereon, and to procure condemnation and sale of said vessels to satisfy the said decrees.

VIII. And your petitioner further shows that on the morning of the 4th day of August, 1891, and after his said bond, duly approved, had been filed as aforesaid, your petitioner went on board said steamboats for the purpose of placing a keeper in charge thereof, and that he found affixed thereto said marshal's notice of seizure under said libels filed by said Moran, and the marshal's keepers on board thereof.

IX. That thereafter, and during the said 4th day of August, 1891, the Lehigh Valley Coal Company, through their proctors, Messrs. McCarthy & Berrier, of the city of New York, caused libels to be filed in said United States district court for the eastern district of New York against the said steamboats "Vanderbilt," "Belle," "Syracuse," "Niagara" and "America," claiming liens for coal furnished said steamboats in the year 1891, under which libels process was issued to the marshal of said district, who claimed to seize and to take into his possession thereunder the said steamboats, and affixed his notice of seizure thereto, and that said Lehigh Valley Coal Company is prosecuting said actions, and proposes, if possible, to obtain decrees under said libel, and to obtain condemnation and sale of said steamboats to satisfy the same.

X. That on the 5th and 6th days of August, Henry C. Pratt, Henry D. Craig, Harvey S. Temple, William Moore, James A. Ackley, Byron Doyle, Charles H. Craig, Henry Becking, Richard F. Howard, Sherman M. Ward, Charles McEwan, Peter Dollard, Frederick H. Boyle, John Curry, John McCann, George Ward, William Reynolds, Walter Lewis, Neil Harrigan, Sylvester Shook, Augustin Giligan, Ephraim Travers, Charles Van Wormer, George Baur, Thomas Keese, George Nichols, John Lilis, Anna Harden, William Cheney, Patrick Joy, Patrick Donegan, Martin Cheney, Daniel Mahan, Thomas H. Clinton, Alfred V. S. Craig, Charles D. Vrooman, Nelson Mull, John Murphy, Susan Clough, Joseph H. Pratt, Levy Kilmer, Warren Welsh, Edward A. Theis, Peter Biglan, James Costello, Edward Fitzgerald, Thomas Welsh, Thomas Stack, John Lyons, James Mahoney and John Hughes, through their proctor, John A. Anderson, Esq., of the city of Brooklyn, caused libels to be filed in said district on behalf of themselves, being the officers and crews of the steamboats "Leonard," "Vander-

bilt," "America," "Belle," and "Syracuse," claiming liens against said steamboats for wages due them, and thereafter petitions were filed in said actions praying that the following named be made colibellants in said actions, said petitioners being others of the crews of said steamboats, viz: William Waltar, John Schemmerhorn, Alice Bush, William Larabee, Patrick Blake, Franklin Frisbie, William Tonk, Howard Cuniff, Arthur Spoor, Philips Price, William R. Vandesen, George Miller, George Blanchard, Joseph Holland, Peter Fredenburg, Moses B. Briggs and James Parsons; that process was issued under said libels to said marshal, under which he claimed to seize and take into his possession said steamboats, and affixed his notice of seizure thereto; that said libels were filed by said parties with knowledge that a receiver of said corporation had been appointed, and that said libellants propose, if possible, to obtain decrees under said libels, and to obtain condemnation and sale of said steamboats to satisfy the same.

XI. That on the 13th day of August, 1891, Patrick Brophy, with knowledge that a receiver of said corporation had been appointed, through his proctor, John A. Anderson, Esq., of the city of Brooklyn, caused a libel to be filed in said district court of the United States against the steamboat "Syracuse," claiming a lien for supplies furnished said steamboat; that process was issued under said libel to said marshal, under which he claimed to seize and take into his possession said steamboat, and affixed his notice of seizure thereto; and that said libellant proposes, if possible, to ob-
22 tain a decree under the said libel, and to obtain condemnation and sale of said steamboat to satisfy the same.

XII. That on the 18th day of August, 1891, August Grill, with knowledge that a receiver of said corporation had been appointed, through his proctors, Messrs. McCarthy & Berrier, cause a libel to be filed in said court against the steamboat "Leonard," claiming a lien against said steamboat for damages arising out of a collision; that process was issued under said libel to said marshal, under which he claimed to seize and take into his possession said steamboat, and affixed his notice of seizure thereto; and that said libellant proposes, if possible, to obtain a decree under said libel, and to obtain condemnation and sale of said steamboat to satisfy the same.

XIII. That on the 19th day of August, 1891, the Lehigh Valley Railroad Company, with knowledge that a receiver of said corporation had been appointed through its proctors, Messrs. McCarthy & Berrier, caused libels to be filed in said district against the steamboats "Belle" and "Niagara," claiming liens for wharfage; that process was issued under said libels to said marshal, under which he claimed to seize and take into his possession said steamboats, and affixed his notice of seizure thereto; and that said libellant proposes, if possible, to obtain condemnation and sale of said steamboats to satisfy the same.

XIV. That on the 25th day of August, 1891, Edward Downing and Merrick Lawrence, with knowledge that a receiver of said corporation had been appointed, through their proctor, William D. Jones, Esq., of the city of New York, filed libels in said district

against the steamboats "Syracuse" and "Belle," claiming liens for repairs thereon; that process was issued under said libels
23 to said marshal, under which he claimed to seize and take into his possession said steamboats, and affixed his notice of seizure thereto; and that said libellants propose, if possible, to obtain decrees under the said libels, and to obtain condemnation and sale of said steamboats to satisfy the same.

XV. That on October 17th, 1891, with knowledge of the appointment of a receiver herein, Jeremiah P. Robinson, Isaac R. Robinson, Elizabeth D. Leonard, and Harriet W. R. Leech, as executors of Jeremiah P. Robinson, deceased, by their proctor, Asa F. Smith, Esq., of New York city, caused libels to be filed in said district against the steamboats "America," "Syracuse," "C. Vanderbilt," and "Belle," claiming liens for wharfage, under which process was issued to the said marshal, by virtue of which he claimed to seize and take said steamboats into his possession, and affixed his notice of seizure thereto; that said libellants propose to prosecute their said libels to decrees, and to procure the condemnation and sale of said steamboats to satisfy the same.

XVI. That on October 20th, 1891, with knowledge of the appointment of said receiver, John Oliver caused a libel to be filed in said district, through his proctors, Messrs. Carpenter & Mosher, against the steamboat Belle, claiming a lien for wages, under which process was issued to the said marshal, by virtue of which he claimed to seize and take into his possession said steamboat, and affixed his notice of seizure thereto; that said libellant proposes to prosecute his said libel to a decree, and to procure a condemnation and sale of said steamboat to satisfy the same.

XVII. Your petitioner further shows that if said libellants are permitted to prosecute their aforesaid libels, and obtain decrees thereunder, and said steamboats are condemned and sold to
24 satisfy the same, it will result, in the opinion of your petitioner, in said vessels being sold for very much less than their actual value; that they will necessarily be sold separately; that the expenses attending such proceedings will amount to many thousand dollars, and the interest of the corporation and of the general creditors thereof will be greatly sacrificed; that if said vessels are placed in the hands of one person and are sold (if a sale should become necessary) as a fleet, they will in the opinion of your petitioner realize a very much larger price than if sold in any other way; that your petitioner believes that all creditors who are entitled to a preference by reason of having liens against the property of said corporation as well as all unsecured creditors can be fully protected in this proceeding; that your petitioner is advised and believes that a larger portion of said claims for which libels have been filed do not constitute liens against said vessels, nor are the libellants entitled to any preference for such portion of said claims.

XVIII. That upon the petition of your petitioner, duly made to this court on the 26th day of August, 1891, your petitioner was, by order duly made and entered on said day, authorized to contest said libels or to take such other proceedings therein as might be

advisable, and to use the funds in his hands, or which might thereafter come into his hands, for the purpose of giving such security therein as he might be able, and which security is required in order to contest said libels. That your petitioner has not sufficient funds in his hands to give the necessary security to contest all of said libels, and is wholly unable to give the security required to release said vessels from the said marshal's custody, for which reason, unless said libellants are restrained from prosecuting said libels, your petitioners will be unable to prevent the condemnation and sale of said steamboats.

25 XIX. That the said libels filed by said Moran on behalf of himself and others, which are about twenty in number, all involve the same questions, viz: As to whether or not there is an admiralty lien or any other services mentioned therein; also as to whether or not the claims are not stale, and therefore barred from recovery in admiralty as constituting a lien; and also the question of the jurisdiction of the said court over said vessels when the libels against them were filed and they were attached by the said marshal; that the libels of the Lehigh Valley Coal Company involve a like question of jurisdiction; and also the question of whether or not a lien in admiralty exists in favor of the libellant, or whether said claims constitute a mere debt against the company, upon the ground that the supplies were furnished upon the personal credit of said company; and that the libels for wages involve a like question of jurisdiction; and also the existence of a lien in favor of the masters of the vessels whose claims are included therein.

That the libel of the said Brophy involves the questions of jurisdiction and lien.

That the libel of the said Grill involves the questions of jurisdiction and also of the liability of said steamboat Leonard for the collision alleged.

That the libel of the Lehigh Valley Railroad Company involves the questions of jurisdiction and lien.

That the libels of Downing and Lawrence and Robinson involve the question of jurisdiction and lien; and that of Oliver involves the questions of jurisdiction and lien.

XX. Your petitioner further shows that in September last your petitioner applied to the judge of the United States district court for the eastern district of New York, upon petition for an order directing the marshal of said district to withdraw from the custody

26 of boats he had no claim to attach, upon the ground that at the time of the filing of the libels, under which the attachments had been made, said steamboats were in the custody of the State court by virtue of the order appointing the receiver herein, heretofore referred to.

That said application was opposed by the proctors for said libellants and *were* denied by said district court judge on the ground that the question of jurisdiction should not be decided upon a motion. Said district judge giving your petitioner the right to answer said libels and to contest the question of jurisdiction by such answers.

Thereupon your petitioner appeared in and filed answers in one action brought against each steamboat for the purpose of contesting the jurisdiction of said court; your petitioner not being able to furnish security necessary to be filed in order to answer all of said libels, being upwards of forty in number.

That thereafter a motion was made on behalf of the aforesaid Moran, in said district court, for the sale of said steamboats against which he had filed libels, on the ground that they were perishable property; such sale to take place pending the trial of any of the actions, the proceeds realized therefrom to be deposited in court to await the result of the action. That your petitioner thereupon appeared and opposed the said motion, and the same was adjourned from time to time until finally the motion was withdrawn, so far as relates to the libels in which your petitioners answered, in order to avoid the effect of your petitioner's opposition to the sale.

That said motion has since been urged in the actions in which your petitioner has not appeared and answered, and has also been pressed on behalf of the Lehigh Valley Coal Company, in whose actions your petitioner has not been able to appear and answer.

27 That said motion has been adjourned until the 13th day of the present month, and said district judge has intimated that it will be granted.

That your petitioner is advised and believes that the sale so contemplated will be ruinous to the interests of all the creditors of the company except, perhaps, the small percentage who have filed libels as aforesaid.

That your petitioner is advised and believes that said district court has no jurisdiction over said steamboats or any of them at the times the libels were filed and the attachments made by said marshal; that said steamboats at the said times were in the custody of this court, and were not subject or liable to such attachments.

That the expenses consequent upon filing said libels and attaching said vessels thereunder are very large, and said property should not be subjected thereto.

That this order to show cause is asked for the reason that, as your petitioner is advised, said motion will be pressed on the 13th inst.

That in addition the said Lehigh Valley Railroad Company are pressing their libels to decrees, their actions having been partially tried, and they expect to obtain decrees within a few days, and propose to obtain the sale of the boats under said decrees.

That the foregoing are the reasons why this order to show cause is asked.

That no previous application has been made for this order.

Wherefore your petitioner prays that said libellants and each of them, and their attorneys and proctors, may be restrained and enjoined from further prosecuting said libels in said district court of the United States, and from taking any proceedings under said libels by motion or otherwise, for the condemnation and sale of

said steamboats, or any of them, or that they may be re-
28 quired to show cause before this court why they should not be so restrained, and that your petitioner may have such other and further relief as he may be entitled to receive.

And your petitioner will ever pray, etc.

FRANK D. STURGES, *Receiver.*

CITY AND COUNTY OF NEW YORK, *ss:*

Frank D. Sturges, being duly sworn, deposes and says, that he is the petitioner in the foregoing petition named; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FRANK D. STURGES.

Sworn to before me this 10th day of November, 1891.

JAMES H. FISH,
*Notary Public, Queens Co.*

Cert. filed N. Y. Co.

29 New York Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

ALBANY COUNTY, *ss:*

James W. Eaton, being duly sworn, deposes and says, that he is the counsel for the receiver herein, and personally has had charge of the presentation of the petition and the obtaining of the order of reference and appointing a temporary receiver herein; that said order was made on the 31st day of July, 1891; that on the first day of August, 1891, at 11.15 a. m., he filed and entered said order and petition, and the schedules upon which the same were granted, in the office of the clerk of the county of Albany; and that on said mentioned day, at 11.45 a. m., he served said order, petition and schedules upon the attorney general of the State of New York, at his office in the city of Albany.

Deponent further says, that he received the receiver's bond herein, duly executed and approved by one of the justices of this court, on the evening of August 3, 1891. Said bond was filed in the clerk's office on the 4th day of August, 1891, at 9 o'clock in the morning.

JAMES W. EATON.

Sworn to before me, this 11th day of November, 1891.

HAROLD L. HOOKER,
*Com'r of Deeds, City of Albany.*

30 N. Y. Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. Vosburgh, being duly sworn, deposes and says:

That he is one of the trustees and a stockholder of Schuyler's Steam Tow-boat Company, and one of the petitioners to this court upon whose petition the order of reference and appointing a receiver was made.

That said order was made on the 31st day of July, 1891; that on the morning of the 2d day of August, 1891, deponent was informed that late in the afternoon of the 1st day of August, 1891, libels had been filed by Michael Moran against the steamboats Syracuse, Belle and Niagara, and that on the evening of said day said vessels had been seized by the United States marshal for the eastern district of New York.

That deponent immediately communicated with said Moran, and requested him not to take any further proceedings until deponent should see him; that subsequently, as deponent has learned, and on August 3d, 1891, said Moran caused other libels, seventeen in number, to be filed on his own behalf, and on behalf of others, against said steamboats, and against the steamboats Vander-
31 bilt, America and Jacob Leonard, all belonging to said corporation, under which said vessels were seized by the said United States marshal, on said 3rd day of August, 1891.

That subsequently said Moran stated to deponent that he had been in Albany on July 31st, 1891, and had ascertained that a receiver of said corporation, Schuyler's Steam Tow-boat Company, had been appointed; and that said Moran further stated that he knew such to be the case, and had caused the libels to be filed in order to secure his claims, as he did not propose that the receiver should get possession of the property of said corporation in advance of his proceeding.

That on the morning of August 4th, 1891, deponent went with the receiver to the foot of Court street, in the city of Brooklyn, where said vessels were lying, at which time the only notices which were attached to said vessels were the notices of the alleged seizure by said marshal, under the processes issued upon the libels of said Moran.

F. W. VOSBURGH.

Sworn to before me this 8th day of September, 1891.

ASA F. SMITH,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

32 N. Y. Supreme Court, Albany County.

In the Matter — the Petition of a Majority of Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward L. Owen, being duly sworn, deposes and says:

That he is a counsellor-at-law of this State, and a member of the firm of Owen, Gray & Sturges, of the city of New York.

That subsequently to the filing of the receiver's bond herein, and on the 4th day of August, 1891, deponent had a conversation with Michael Moran, in the presence of the receiver herein, at deponent's office, No. 71 Wall street, in the city of New York, at which time said Moran stated that he had been to Albany on the Friday previous, which was July 31st; that he had then learned that a receiver had been appointed of said corporation, Schuyler's Steam Tow-boat Company, and that he had filed his libels, because, as he expressed it, "he did not propose to be left."

That at the time the request was made to said Moran by the receiver that he should withdraw his proceedings; but said Moran declined to do so until he was secured for at least a portion of his claim and the expenses.

EDWARD L. OWEN.

Sworn to before me, this 8th day of September, 1891.

ASA F. SMITH,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

33 At a special term of the supreme court, held at chambers, at the city hall, in the city of Albany, on the 31st day of July, 1891.

Present—Hon. William L. Learned, justice.

Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

On reading and filing the petition of Samuel Schuyler, James B. Schuyler, Francis W. Vosburgh, Lemuel J. Hopkins and Thomas V. Wolcott, verified the 31st day of July, eighteen hundred and ninety-one, and the schedules thereto attached, and due proof of service of notice of this application upon the attorney general of the State of New York, after hearing James B. Eaton, Esq., on behalf of petitioners, and said attorney general appearing and consenting thereto.

It is ordered, that all persons interested in the corporation known as Schuyler's Steam Tow-boat Company show cause before John A. Delehanty, Esq., a referee, who is hereby appointed for that pur-

pose, at his office in the city of Albany, on the sixteenth day
34 of November, eighteen hundred and ninety-one, at ten o'clock in the forenoon of that day, why the corporation, Schuyler's Steam Tow-boat Company, should not be dissolved.

It is further ordered, on motion of the petitioners, that Frank D. Sturges, of the city of New York, be and he is hereby appointed a temporary receiver of the property of the said corporation, with all the powers and subject to all the duties that are defined as belonging to temporary receivers, appointed in an action in section 1788 of the Code of Civil Procedure.

It is further ordered, that all creditors of said corporation, be and they are hereby restrained and enjoined from bringing any actions against the said corporation for the recovery of a sum of money, and from taking any further proceedings in any action already commenced against the said corporation for such purpose.

It is further ordered, that a copy of this order be published at least once in each of the three weeks immediately preceding the time above fixed, to wit: the sixteenth day of November, eighteen hundred and ninety-one, for showing cause, in the newspaper printed at Albany, in which legal notices are required to be published, to wit: the Albany Argus, and also the Albany Times, a newspaper printed and published in the city of Albany, county of Albany, and State of New York, and that a copy of this order be served upon each of the several persons specified in the schedule attached to the petition in this matter as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed other than a person whose residence is stated to be unknown or to be without the United States, such service to be made either personally at least twenty days before the time appointed for the hearing, or by depositing a copy of the order at least forty days before the time so appointed in the post office, enclosed in a post-paid wrapper and addressed to the person to be served, at his residence as stated in the schedule.

35 It is further ordered, that before entering upon the execution of his duties as such receiver the said receiver do make, execute and acknowledge in due form of law his bond, in the penal sum of fifty thousand dollars, to the people of the State of New York, in accordance with the practice of this court and the statute relating thereto, in which bond two sureties shall join who shall each acknowledge said bond and justify in the sum of one hundred thousand dollars over and above all their just debts and property exempt by law from execution, which bond shall be conditioned for the faithful execution of the trusts reposed in the said receiver, and for his due accounting for all property and money which shall come into his hands as such receiver, and shall be filed in the office of the clerk of the county of Albany.

Enter Albany county.

WM. L. LEARNED,
*Jus. Sup. C't.*

(Endorsed:) Supreme court. In the matter of the petition of a majority of the trustees of Schuyler Steam Tow-boat Company, a corporation, for its dissolution. Copy order. J. W. Eaton, attorney for petitioners, Tweddle building, Albany, N. Y. Take notice, that an order, of which the within is a copy, was duly entered in the office of the clerk of Albany county, on the 31st day of July, 1891, and that Frank D. Sturges, therein named as receiver, has duly filed with said clerk the bond, duly approved, as in said order provided, and has, in all respects, duly qualified and entered upon the duties as such receiver. Dated Albany, August 5, 1891. Frank D. Sturges, receiver, 71 Wall street, New York, N. Y. James W. Eaton, attorney for receiver, Tweddle building, Albany, N. Y.

36 Supreme Court, Albany County.

In the Matter of a Petition of the Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

To the honorable the supreme court of the State of New York:

The petition of Samuel Schuyler and James B. Schuyler, Lemuel J. Hopkins and Thomas V. Wolcott, all of the city and county of Albany, and of Francis W. Vosburg, of the city and county of New York, in the State of New York, respectfully shows to this honorable court, that they are all of the trustees who have the management of the concerns of the corporation created by and under the laws of the State of New York, to wit: chapter 40 of the laws of 1848 and the several acts amendatory thereof and supplementary thereto, and known by the name and designation of the Schuyler's Steam Tow-boat Company, which said corporation has its principal office in the city of Albany, county of Albany and State of New York, and is engaged in the business of towing vessels, &c., by steam power for hire; and that your petitioners are owners and holders of over seven-tenths ($\frac{7}{10}$) of the capital stock of said corporation.

That your petitioners have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable, nor are they sufficient to afford
37 a reasonable security to those who may deal with it, for the following reasons, to wit: That, as will be seen from the schedule hereto attached, this corporation is indebted to the Holland Trust Company of New York in a large sum of money on a demand loan. The payment of said loan has been demanded and insisted upon, and that there are no available assets to meet the same. That the said corporation has already defaulted upon the claims of J. F. Schmidt and of William Wall's Sons set forth in the annexed schedule, which were secured by notes, which notes have been presented for payment, and payment refused, for the reason that the company had no available assets with which to pay the same. That other claims set forth in the schedule are either due or rapidly becoming due, and that there is serious danger of the company's vessels, constituting the sole property of the said company,

being libelled in the admiralty courts of the United States for such claims as constitute maritime liens, including the claims for services and supplies rendered to said vessels. That in the event of said vessels being libelled and sold under a decree in admiralty, there would be little hope in realizing the value of said vessels on such sale, and the security of creditors and stockholders would be seriously imperilled.

That it is impossible out of the available assets of the said corporation to pay the amount of the claims set forth in the annexed schedule, or any one of them, and the same will have to be realized upon a sale of the chattels and property of the company which are insufficient to pay all claims in full.

That the cash capital of the said corporation is insufficient to enable it to continue its business.

That it is beneficial in the judgment of your petitioners to the interest of the stockholders of said corporation that said corporation should be dissolved.

38 That according to the best of the knowledge of your petitioners and so far as your petitioners have the means of knowing the same, the schedules hereto attached contain—

1. A full and true account of all the creditors of the corporation and of all unsatisfied engagements entered into by and subsisting against the corporation.

2. A statement of the name and place of residence of each creditor and of each person with whom an engagement was made, and to whom it is to be performed if known, or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision and the nature of each debt, demand or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers and securities relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge or otherwise.

7. A full, just and true account of the capital stock of the corporation, specifying the name of each stockholder, his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares and the amount still due thereupon.

Wherefore, your petitioners ask that this honorable court will make an order requiring all persons interested in the corporation, to show cause before it or before a referee designated in the order at a time and place therein specified not less than three months after the granting of the order, why the said corporation should not be dissolved and that a temporary receiver of the property of the

39 corporation, who shall have all the powers and be subject to all the duties which are defined as belonging to temporary receivers, appointed in an action in section 1788 of the Code of Civil

Procedure, may be appointed, and that an injunction may be granted restraining the creditors of the corporation from bringing any action against the said corporation for the recovery of any sum of money or from taking any further proceedings in any such action heretofore commenced, and that your petitioners may have such other and further order or relief in the premises as may be just.

SAMUEL SCHUYLER.
J. B. SCHUYLER.
F. W. VOSBURGH.
LEMUEL J. HOPKINS.
THOS. V. WOLCOTT.

STATE OF NEW YORK, *Albany City and County,* } ss:

Samuel Schuyler, James B. Schuyler and Francis W. Vosburgh, Lemuel J. Hopkins and Thomas V. Wolcott, being each duly severally sworn, each for himself says, that he is a trustee of Schuyler's Steam Tow-boat Company; that he has read the foregoing petition subscribed by him, and the schedules thereto attached, and knows the contents thereof, and the same are just and true so far as this affiant knows, or has the means of knowing the same.

SAMUEL SCHUYLER.
J. B. SCHUYLER.
F. W. VOSBURGH.
LEMUEL J. HOPKINS.
THOS. V. WOLCOTT.

Subscribed and sworn to before me this 31st day of July, 1891.
CHARLES F. BRIDGE,
*Com. of Deeds, Albany, N. Y.*

40 Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY for a Dissolution.

CITY AND COUNTY OF NEW YORK, ss:

Michael Moran, being duly sworn, says:

I am one of the persons named in the petition of Frank D. Sturges, Esq., receiver, verified November 10, 1891, and also named in the order to show cause based in part on said petition, dated November 11, 1891, made by Mr. Justice Fursman.

I have had business dealings with Schuyler's Steam Tow-boat Company, and its predecessor corporation, and with Samuel Schuyler for a number of years.

In the week beginning July 19, 1891, my suspicions were aroused as to the intentions of Schuyler's Steam Tow-boat Company, and I consulted my counsel about filing libels against their boats. On the same day I sought out F. W. Vosburgh, who was the manager of the line in New York, and had a conversation with him in which

I told him that I suspected there was something wrong, that they were going to do something, and that I wanted to come in first; Vosburgh replied that they were not doing anything, and if they did anything he would let me know in time to protect myself. Relying upon these representations I refrained from taking any immediate proceedings to libel the tow-boats.

41 Late on Friday, July 31, 1891, I was informed that Frank D. Sturges and F. W. Vosburgh were in Albany, and were trying to induce Samuel Schuyler to have a receiver appointed for the company, and was also informed that they had been before a judge to apply for the appointment of a receiver; but I was not informed and did not know that any receiver had been appointed, or when it was sought to have — appointed. Mr. Vosburg had given me no notice of these contemplated proceedings as he had promised to do.

As soon as possible, after obtaining the above information, and on Saturday. August 1, 1891, I instructed my counsel, Messrs. Carpenter & Mosher, to prepare and file the libels which were subsequently filed in behalf of myself and co-owners against various boats of Schuyler's line.

At the time of giving such instructions I had no knowledge or information that any receiver had been appointed.

On Saturday, August 1st, after I had given instructions for preparing the libels as aforesaid I looked for Frank W. Vosburgh; I met him in a restaurant on Broad street, New York, and had some conversation with him, in the course of which he said that he had been to Matteawan to see his daughter for a couple of days, and asked me to go with him to the races at Morris park; I told him I couldn't go because I had to get together money for my Saturday expenses, and added that I expected to get some money from him, and hadn't got any; he replied that he would be back in his office in twenty minutes, and I then left him. I called several times at his office in the afternoon, but did not see him again. Said Vosburgh gave me no information whatever in said conversation about any application for or appointment of the receiver, and acted in all ways as if the business of the line was going on as usual.

42 My first information of the appointment of the receiver was contained in a short pencil note written by said Vosburg addressed to me which was left at my house on Sunday, August 2, 1891, and was received by me the same night. It was in substance as follows, according to my best recollection:

"Frank B. Sturges was appointed receiver of Schuyler's towing line by the supreme court at Albany on Friday last; I think you are making a mistake, do nothing further until you see me." I believe this to be the communication mentioned in said Vosburgh's affidavit on this motion.

On Monday, August 3, 1891, I received at my office, No. 12 South street, in the city of New York, a telephone message from the office of Messrs. Owen, Gray & Sturges, asking me to call at their office; in compliance with such request I immediately proceeded to their office and met Frank W. Vosburgh and Frank D. Sturges, we had

a conversation in the office of Mr. Sturges. I said to Vosburg that he had been in Albany on Thursday with Mr. Sturges, and that I was also there on Thursday; I did not then or at any time tell Vosburgh that I was in Albany on Friday, and in fact I was not in Albany on Friday; I did not then or at any time tell Vosburgh that I had ascertained on that day that a receiver of Schuyler's Steam Tow-boat Company had been appointed, nor did I state that I knew such to be the case; I did state in substance that I had caused libels to be filed in order to secure our claims, and that I did not propose that the receiver should get possession of the property upon which we claimed maritime liens in advance of my libels. I did not then or at any time state to Mr. Sturges that before any of my libels were filed I knew that a receiver of the tow-boat company had been appointed; I did not say to him in substance that I did not intend to be prevented from inforcing my liens as I had been prevented in a similar case which recently oc-
43 curred where a receiver had been appointed before I filed my libels, and I added that a burnt child dreaded the fire; the case to which I referred was the case of the Ridgewood Ice Company.

I was not in the office of Owen, Gray & Sturges on the 4th day of August, 1891, which was Tuesday; I was however in their office on Monday, August 3, 1891, as above stated and after my interview with Frank W. Vosburgh and Frank D. Sturges, Mr. E. L. Owen came into Mr. Sturges' room and took part in the conversation; I did not then or at any time state in the presence or hearing of Mr. Owen that I had been to Albany on the Friday previous, to wit, July 31; I did not then or at any time state that I had learned on Friday at Albany or elsewhere that a receiver had been appointed of Schuyler's Steam Tow-boat Company; I did not state in substance that I had filed my libels, because, as correctly quoted by Mr. Owen, I did not propose to be left.

It is true that at said interview the receiver requested me to withdraw my proceedings, without any benefit to myself or co-owners, and it is also true that I declined to do so unless my claim was secured.

No copy of the order appointing a temporary receiver herein was served upon me until after all the libels in behalf of myself and co-owner were filed.

(S'd) MICHAEL MORAN.

Sworn to before me this 21st day of November, 1891, *ss.*

[SEAL.] ALBERT A. WRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

44 Supreme Court, Albany County.

In the Matter of the Application of a Majority of the Trustees of the SCHUYLER STEAM TOWS-BOAT COMPANY, a Corporation, for its Dissolution.

CITY OF BROOKLYN, }
*County of Kings*, } ss.:

John A. Anderson, being duly sworn, says he is attorney for Henry C. Pratt and other seamen, libellants, who have filed libels in United States court for the eastern district of New York, against the boats of the Schuyler Steam Tow-boat Company, for the purpose of recovering their wages as seamen and which are still due and unpaid.

II. That on the 12th day of November, 1891, deponent was served in the city of New York with an order to show cause made by Mr. Justice Furman on the 11th day of November, 1891, and returnable before the special term at the city of Kingston, on the 14th day of November, 1891, requiring all parties who had filed libels in the United States district court, for the eastern district of New York, against the boats of the Schuyler's Steam Tow-boat Company, for wages due them as seamen on said boats, to show cause why they should not be restrained and enjoined from enforcing said libels—said order to show cause, also contained a provision restraining all such libellants from taking any further action upon said libels, until the hearing and determination of said order to show cause.

45 III. That deponent attended upon the return day of said order to show cause, to wit, the 14th day of November, 1891, at Kingston, before the special term of this court, presided over by Mr. Justice Edwards, and the hearing of said motion was adjourned *of* consent by order of said Mr. Justice Edwards, to be held at the special term of this court, held on the 24th day of November, at the city hall, in the city of Albany, at 10 a. m.

IV. That in pursuance of said adjournment, deponent attended the special term of this court, at Albany, on the 24th day of November, 1891, and upon the motion being brought up for hearing before said court, Mr. Justice Fursman, who was then and there presiding, declined to hear the same for the reason as deponent understood of being connected with, or related to some of the parties in the matter, and therefore he declined to hear the motion, and adjourned the hearing of said motion to the special term of this court held at the city of Hudson, on the 5th day of December, 1891, at 10 a. m.

V. That deponent attended before the special term of this court, at the city of Hudson, on the 5th day of December, 1891, presided over by Mr. Justice Edwards, and upon the motion being brought to his notice, he stated that owing to the pressure of other cases then before him on said day, he would probably be unable to hear the motion, and thereupon those who were present at said special term, to wit: James W. Eaton, Esq., attorney for the receiver, the petitioner herein, E. D. McCarthy, Esq., attorney for the Lehigh Coal

Company, Joseph F. Mosher, Esq., attorney for Michal Moran, and deponent the attorney for the seamen, libellants, consented to adjourn the hearing of said motion to the special term of this court, to be held at Saratoga, on the 7th day of December. 1891, at
46 10 a. m., and which consent was endorsed on the back of the moving papers in the possession of Mr. Eaton, and signed by your deponent.

VI. That in pursuance of said last-mentioned adjournment deponent attended the special term of this court at Saratoga on the 7th day of December, 1891, and no one appearing on behalf of the motion and after waiting nearly an hour after the opening of said special term, which convened at 2 o'clock, on said day deponent brought the matter to the attention of Mr. Joseph Potter, who was presiding, and moved that the motion be denied and the stay mentioned in said order to show cause be vacated with ten dollars, which was granted—and thereafter to wit, on the 9th day of December, 1891, deponent filed said order in the office of the clerk of the county of Albany, and served a copy of a certified copy of said order on James W. Eaton, Esq., attorney for the receiver, the petitioner *at* herein at Albany by mail, on the 10th of December, 1891.

VII. Deponent further says that the allegation made by Harold L. Hooker in his affidavit herein dated December 11, 1891, that "there was an agreement entered into by the opposing attorneys, by which said E. D. McCarthy was to oppose said motion before Mr. Justice Putnam and was to represent all of the respondents upon such hearing"—was and is contrary to the fact and untrue so far as this deponent is concerned.

VIII. Deponent further says that he was in absolute ignorance of the action taken by Mr. Eaton and McCarthy or either of them or even of their intention to go before Mr. Justice Putnam at Albany, and did not learn the same until the afternoon of Friday, the 11th inst., when he was informed incidentally by one of
47 the clerks in Mr. McCarthy's office, and as a matter of fact when the consent to adjourn the motion to the special term at Saratoga was signed by deponent at the city of Hudson, on the 5th inst., he distinctly stated to Mr. Eaton that it would perhaps be impossible for deponent to reach Saratoga at 10 a. m., on the morning of the 7th inst., and that in reply Mr. Eaton then and there said that he would hold the motion until 2 o'clock in the afternoon and that if he made the hour any later than 10 a. m., he might have some trouble, in holding the same until deponent's arrival.

IX. Deponent further says that the action of Mr. Eaton in going before Mr. Justice Putnam at Albany is irregular, for the reason that the adjournment of the hearing of said order to show cause, was to the special term at Saratoga on the 7th inst., and not before any particular judge.

X. Deponent denies that the said Schuyler Steam Tow-boat Company will suffer irreparable loss if the libellants are allowed to prosecute their claims in the United States district court for the reason that deponent *as he* is informed and believes that the title to said property is in the Holland Trust Company of New York

who have or hold a mortgage to secure the payment of fifty thousand dollars, covering said boats and that in consequence of the non-performance of certain conditions in said mortgage the title is in said trust company and at the most all the Schuyler Tow-boat Company's interest in said boats might be an equity of redemption.

XI. That deponent has been put to great expense in attending at the several places at which said motion was to be heard amounting to about forty dollars.

That his clients are poor people who are unable to ad-
48 vance the necessary disbursements in the matter, that as deponent is informed and believes the said boats or property will not sell for enough to pay the liens thereon.

That said property is continually deteriorating in value, the said boats being only fit for towing between New York and Albany, and the season for such purpose being about to close, an immediate sale is for the benefit of all concerned.

XII. Deponent also says that it is for the interest of all concerned that said boats should be sold by the United States marshal in the proceedings, *in rem*, instituted against them, as such a sale would give perfect title, extinguishing all liens, while a receiver sale would only be exposing for sale the right, title and interest of an insolvent corporation, which would result in getting no bids or obtaining no price, and deponent further says that he believes the action of the petitioner is not made in good faith, but to hinder and delay, and which will inevitably result in depriving the poor seamen of money which rightfully belongs to them.

(S'd) JOHN A. ANDERSON.

Sworn to before me, this 12th day of December, 1891.

ALBERT E. DE MOTT,
*Notary Public, Kings County, N. Y.*

49 At an adjourned special term of the supreme court held at the city hall in the city of Albany, on the 7th day of December, 1891.

Present—Hon. John R. Putnam, justice.

Supreme Court, Albany County.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

The motion, arising under the order to show cause heretofore and on the 11th day of November, 1891, made herein, having come on to be heard in pursuance of various adjournments duly had, now, on reading and filing said order to show cause, together with the petition of Frank D. Sturges, verified November 10th, 1891, the affidavit of James W. Eaton, verified November 11th, 1891, the affidavit of Francis W. Vosburgh, verified September 8th, 1891, the affidavit of Edward L. Owen, verified September 8th, 1891, all of which are annexed to said order to show cause, and upon reading

and filing the affidavit of Michael Moran, verified the 21st day of November, 1891, the affidavit of John A. Anderson, verified the 12th day of December, 1891, and upon the petition heretofore and on the 1st day of August, 1891, filed herein, and upon all proceedings subsequently had thereunder, after hearing James W. Eator, Esq., of counsel for Frank D. Sturges, temporary receiver in behalf of this motion, and Carpenter & Mosher, Esqs., attorneys for Michael Moran, Peter Cahill, Cynthia Cahill, Jarvis Masters and John Oliver, for the purpose only of opposing this motion, and McCarthy & Berrier, Esqs., attorneys for the Lehigh Valley Coal Company, the Lehigh Valley Railroad Company and for August Grill and John A. Anderson, Esq., attorney for Henry C. Pratt, Henry D. Graig, Harvey S. Temple, William Moore, James A. Ackley, Byron Doyle, Charles H. Craig, Henry Becking, Richard F. Howard, Sherman M. Ward, Charles McEwan, Peter Dollard, Frederick H. Boyle, John Curry, John McCann, George Ward, William Reynolds, Walter Lewis, Neil Harrigan, Sylvester Shook, Augustin Gilligan, Ephram Travers, Charles Van Wormer, George Baur, Thomas Keese, George Nichols, John Lilis, Anna Harden, William Cheney, Patrick Joy, Patrick Donegan, Martin Cheney, Daniel Mahan, Thomas H. Clinton, Alfred V. S. Craig, Charles D. Vrooman, Nelson Mull, John Murphy, Susan Clough, Joseph H. Pratt, Levi Kilmer, Warren Welsh, Edward A. Theis, Peter Biglin, James Costello, Edward Fitzgerald, Thomas Welsh, Thomas Stack, John Lyons, James Mahoney, John Hughes, William Walter, John Schermerhorn, Alice Bush, William Larabee, Patrick Blake, Franklin Frisbie, William Tonk, Howard Cuniff, Patrick Brophy, Arthur Spoor, Philips Price, William R. Vandesen, George Miller, George Blanchard, Joseph Holland, Peter Fredenburg, Moses B. Briggs and James Parson, in opposition to said motion, and upon proof of service of notice of this motion upon all other parties to this motion hereinafter named, and after due deliberation.

50

It is ordered, that Michael Moran, Peter Cahill, Cynthia Cahil, Jarvis Masters, the Lehigh Valley Coal Company, the Lehigh Valley Railroad Company, Henry C. Pratt, Henry D. Craig, Harvey S. Temple, William Moore, James A. Ackley, Byron Doyle, Charles H. Craig, Henry Becking, Richard F. Howard, Sherman M. Ward, Charles McEwan, Peter Dollard, Frederick H. Doyle, John Curry, John McCann, George Ward, William Reynolds, Walter Lewis, Niel Harrigan, Sylvester Shook, Augustin Gilligan, Ephraim Travers, Charles Van Wormer, George Baur, Thomas Keese, George Nichols, John Lilis, Anna Harden, William Cheney, Patrick Joy, Patrick Donegan, Martin Cheney, Daniel Mahan, Thomas H. Clinton, Alfred V. S. Craig, Charles D. Vrooman, Nelson Mull, John Murphy, Susan Clough, Joseph H. Pratt, Levi Kilmer, Warren Welsh, Edward A. Theis, Peter Biglin, James Costello, Edward Fitzgerald, Thomas Welsh, Thomas Stack, John Lyons, James Mahoney, John Hughes, William Walter, John Schermerhorn, Alice Bush, William Larabee, Patrick Blake, Franklin Frisbie, William Tonk, Howard Cuniff, Arthur Spoor, Philips Price, William R. Vandeson, George Miller, George Blanchard, Joseph

51

Holland, Peter Fredenburg, Moses B. Briggs, James Parsons, Patrick Brophy, August Grill, Edward Downing, Merrick Lawrence, Jeremiah P. Robinson, Isaac R. Robinson, Elizabeth D. Leonard, Harriet W. R. Leech and John Oliver, and each of them and their and each of their attorneys and proctors be, and they are hereby enjoined and restrained from taking any further proceedings in the actions in the United States district court for the eastern district of New York, in which libels have been filed by or on behalf of said parties against said Schuyler's Steam Tow-boat Company, or against the steamboats of said Schuyler's Steam Tow-boat Company, except the steamboat "Niagara," viz: the steamboats "America," "Belle," "Syracuse," "C. Vanderbilt," "Jacob Leonard" and any other boats of said company against which libels have been filed on behalf of said parties except the steamboat "Niagara," and also enjoined and restrained from further prosecuting or taking any action
52 whatsoever, under said libels and each and all of them, and from taking any proceedings looking to the condemnation and sale of said steamboats or any of them, except the steamboat "Niagara."

Enter in Albany county.

(Signed) JOHN R. PUTNAM, *J. S. C.*

County clerk's certificate.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

PUTNAM, *J.*:

It is settled by the court of appeals in a similar case (Matter of the Christian Jensen Co., 40 N. Y. S. Rep., 621) that the filing of the original petition, and entry of the order thereon, appointing Frank D. Sturges receiver of the Schuyler Steam Towing Company at once vested the title of the property of said corporation in said receiver. He could not act until the giving of his bond, but on filing such bond his title related back to the date of his appointment. The court held in the case cited that after the filing of the petition and entry of the order the title of the property being in the receiver, it was in the custody of the law, and the court had
53 the power to prevent any interference with it in any action, and its dissipation or removal by writ of replevin or attachment.

See also Gluck & Becker on Receivers, sec. 45; note.
Matter of John Barry, 26 Barb., 55.
Smith *vs.* The N. Y. Consolidated Stage Co., 18 Abb. Prac. Rep., 420.
Atlas Bank *vs.* Nahant Bank, 25 Pick., 480.
Matter of Mallory, 18 N. Y. S. Rep., 499.

In the Jensen case (*supra*) the court sustained an order restraining the defendant from proceeding in replevin or attachment levied

upon the property after the filing of the petition and entry of the order appointing a receiver, but before the filing of his bond.

There is no dispute about the facts of this case. It is conceded that the petition was filed and that an order appointing a receiver granted before any of the libels were filed; and hence, when said libels were in fact filed, the title of the property in question was in the receiver as an officer of the court. The property was in the constructive possession of the court. Hence, if the property in question had been seized under process issued from a State court by the defendant-, no question would arise as to the power of this court to restrain the defendants from further proceeding.

Can this court also restrain defendants from proceeding in the Federal court?

I shall be unable to discuss the very many authorities to which I have been cited, but I have examined and considered most of them. I have finally reached the conclusion that this court having, through its receiver, taken possession of the property in question, before the libels of the defendant- were filed in the United
54 States court, can protect the property so in its possession as against process issued from the Federal court as well as from a State court. I think this power is conferred upon this court by sec. 2423 of the Civil Code (Matter of the Christian Jensen Co., *supra.*) That section confers upon the supreme court in this proceeding the same power that exists in a court of equity to restrain parties from proceeding in other courts, State or National.

It is true that the supreme court of the State probably cannot stay proceedings in the Federal courts, but it may stay parties in any action in the Federal courts from proceeding, at least before judgment therein.

See Dinsmore *vs.* Neresheimer, 32 Hun., 206.
Dehon *vs.* Foster, 4 Allen, 450.
Att'y Gen. *vs.* Insurance Co., 77 N. Y., 272–277.
Vail *vs.* Knapp, 49 Barb., 308–309.
Claflin & Co., *vs.* Hamlin, 62 How., 284.
Note to sec. 111, High on Injunctions, p. 92.
Barry *vs.* Brune, 71 N. Y., 261.
People *vs.* Erie R. R. Co., 36 How., 132.

The above cases establish the doctrine laid down in Dehen *vs.* Foster, *supra*, in which case the court remarked: "The authority of this court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State, or of other States, or foreign countries, is clear and undisputable. In the execution of this power courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals or to prevent them from adjudicating upon the rights of parties when drawn in controversy, and duly presented for their determination. But the juris-
55 diction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will

work an injury to others, and are therefore, contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country."

The granting of an injunction as asked for by the moving party does not at all conflict with the doctrine as laid down in such cases as that of Riggs *vs.* Johnson County, 6 Wall., 106, and kindred cases. Because,

1st. The injunction asked for herein is not to be directed to the Federal court but to a party to an action therein to prevent him, as a creditor of the Schuyler Steam Towing Company from interfering with the property in the constructive possession of the State court through its receiver and which that court so obtained possession of before the defendants' libels were filed. And

2d. Because the State court had obtained jurisdiction—obtained title to the property before defendants' libels were filed. The doctrine is well established in both State and Federal courts, as a general rule, that the court which first obtained jurisdiction will retain it to the end.

See Riggs *vs.* Johnson County, 6 Wall., 196.
Rio Grande R. R. Co., *vs.* Gomila, 132 U. S. R., 485.
Wallace *vs.* McConnell, 13 Peters, 136–151.
Taylor *vs.* Taintor, 16 Wall., 370.
Taylor *vs.* Carryl, 20 How., U. S., 583.
Hagan *vs.* Lucas, 10 Peters, 400.
56 Beaston *vs.* Bank, 12 Peters, 102.
Wiswall *vs.* Sampson, 14 How. U. S., 52.
Williams *vs.* Benedict, 8 How. U. S., 109.

In my judgment it makes no difference as to the right of the receiver to hold the property in question that he had not taken actual possession at the time the libels were filed. Under the doctrine settled in the "Christian Jensen" case, *supra*, when the libels were filed and the property attached thereunder the receiver had the actual title. The property was then in the constructive possession of the court.

This case differs from those cited by the defendants where conflicts have arisen between marshals and sheriffs under execution or attachments in which those authorities hold that the officer who first takes actual possession will hold the property. In those cases the title of the property was in the debtor. The sheriff or marshal having the execution or attachment did not acquire title to the property until the seizure by him and hence the one first seizing, held it.

But in this case, by the order of the Supreme Court, the title at once vested in the receiver before its seizure by the marshal. When the marshal undertook to take the property it was in the legal custody of the court. Without attempting to discuss the various cases cited by the defendants, I think them different from this in the regard above mentioned. In any event, I feel bound by the holding of the

court of appeals in the "Jensen" case. There a petition was filed and an order appointing a receiver entered on the 10th in the morning, and in the afternoon of the same day, the property was replevined and attached and afterwards the receiver filed his bonds. Of course, the receiver had not taken actual possession when
57 the attachment was levied. Yet, the court of appeals sustained an order enjoining the defendant from proceeding under his attachment and replevin, holding that the order when entered "was effectual to appoint the receiver and the moment he was appointed he became an officer of the court, and from that time the property of the corporation was in *custodia legis*, and the court had the power to protect and preserve it. * * * It therefore follows that when this property was attached and replevined on the 11th day of March the title was in the receiver and the property was in the custody of the law, and the court had power to prevent any interference with it in any action, and its dissipation and removal by writ of replevin or attachment."

See also—

Beach on Receivers, sec-. 200, 201.
Wilson *vs.* Allen, 6 Barb., 542, 545, 546.
Storm *vs.* Waddell, 2 Sand. Chan., 494.

The latter case holds that the order appointing the receiver in itself is equivalent to an actual levy on the property.

I think it is the general doctrine that an order being made to appoint a receiver, on his filing the bond required by the order, his title relates back to the day of the entry thereof. In Maryland a different doctrine prevails and hence the case of Farmers' Bank *vs.* Beaston (7 Gill & Johnson, 428) cited by the defendants does not apply.

The doctrine so laid down in the "Jensen" case and other cases above cited that the title vested in the receiver on entering the order and from that time the property was in the custody of the court and it had power to prevent any interference with such property in any action means an action in the Federal as well as one in a State court. The title being vested in the receiver on the entry
58 of the order, and, hence in the hands of the court, may not be interfered with afterwards by any creditor, in any court, State or National.

I am unable to perceive that the case of Varnum *vs.* Hart (119 N. Y., 101), has any bearing upon this. There the sheriff had seized the property and had it in his possession before the appointment of a receiver. In Walling *vs.* Miller, although the levy was before the appointment of a receiver, before the sale the receiver had obtained actual possession and the court held that such sale, the property being in the actual possession of the receiver, was irregular and void. The same doctrine was held in Wiswall *vs.* Sampson (14 How. U. S., 52). These cases do not bear on a case like this where the appointment of a receiver, and his actual title was prior to any levy.

The receiver not having taken actual possession of the property

at the time it was seized by defendants it may be that they are not guilty of any contempt. Defendants were not bound to know that the order in this case appointing a receiver had been granted. It is not conceded that at the time the libels were filed and the property seized the defendants had knowledge that such property was in the custody of the supreme court of the State. In the absence of such knowledge it is not probable that there could be any contempt. I do not think that the case of The Albany City Bank *vs.* Schermerhorn (9 Paige, 372) aids the defendants. There the question was as to the contempt of the party proceeding against, and the case does not seem to bear on the questions involved here. In that case the court held that where a receiver appointed in a creditor's suit is entitled to the personal property of the defendants and the rents and profits of his real estate, if the defendant neglects to make an assignment, so as to give the receiver a legal title to the property, the court, upon a bill filed by the receiver, will protect his rights against sheriffs and others who have seized upon the
59 property to prevent his obtaining possession thereof. In other words, secure to the receiver the possession of the property. Such is the object of the motion.

Without further comment upon the various cases cited by the counsel, I think the holding of the courts in the cases cited determine that on granting the order appointing the receiver in this proceeding and the entry of said order, the receiver at once became vested with the title of the property of the corporation, and such property from that time being deemed in the custody of this court, such court may and should protect it, and may and should enjoin defendants from proceeding further in the actions commenced by them as against the said property. And this notwithstanding the defendants are proceeding by filing libels in the Federal court in admiralty.

See Taylor *vs.* Carryl, 20 How. U. S., 583, 584, 599.

The motion heretofore made by the receiver in the Federal court and the order granted thereon is not an estoppel, especially as the court did not assume to pass upon the merits of the application.

The chattel mortgage upon the property, inasmuch as the mortgagee does not elect to take possession by foreclosure, leaves an equity of redemption in the corporation which passed to the receiver and which he can protect.

Randale *vs.* Dunbar, 14 W. Digest, 332.
West *vs.* Crary, 47 N. Y., 423.
Porter *vs.* Parmley, 52 N. Y., 188.

On the whole, I think the motion should be granted. As the matter is of much importance the receiver should submit the proposed order to counsel for defendants before the same is sent me for my signature.

60 Supreme Court, Albany County.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY for its Dissolution, &c.

GENTLEMEN: Please to take notice that Michael Moran, Peter Cahill, Cynthia Cahill and Jarvis Masters, appeal to the general term of the supreme court in the third department, from the order made herein at a special term of the supreme court, held by Mr. Justice Putnam, dated the 7th day of December, 1891, and entered in the office of the clerk of Albany county on the 8th day of February, 1892, enjoining and restraining the appellants from taking any further proceedings in the actions in the United States district court for the eastern district of New York, in which libels have been filed, by or on behalf of said parties, and from taking any proceedings looking to the condemnation or sale of said steamboats, or any of them, and from each and every part of the aforesaid order.

Dated March 9, 1892.

Yours, &c., CARPENTER & MOSHER,
*Attorneys for Michael Moran, Peter Cahill, C. Cahill, and J. Masters, Appellants.*

To the clerk of the county of Albany; James W. Eaton, Esq., attorney for Frank D. Sturges, petitioner, respondent.

61 At a general term of the supreme court, held in and for the third judicial department, at the city hall, in the city of Albany, on the 2d day of July, 1892.

Present—Hon. Stephen L. Mayham, presiding justice and Hon. D. Cady Herrick, justice.

Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

The appeal from the order entered in this action on the 8th day of February, 1892, restraining the libellants from proceeding against the boats of the above-named company, in the custody of its receiver, having been duly submitted to this court by consent of counsel, and upon reading the case and exceptions on appeal herein, on file with the clerk of this court; and due deliberation having been had, now, on motion of James W. Eaton, of counsel for the respondent herein, it is

Ordered, that the said order appealed from be, and the same is hereby, in all things affirmed, with costs.

Enter.

A. C. REQUA, *Clerk.*

62 Supreme Court, Albany County.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY for its Dissolution, &c.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph F. Mosher, being duly sworn, deposes and says, that he is one of the attorneys of counsel herein for the appellants Michael Moran and others and that no opinion was rendered herein by the general term of the supreme court, upon making the order herein, dated July 2d, 1892, affirming the order of injunction made by Mr. Justice Putnam, at special term, dated December 7th, 1891.

JOSEPH F. MOSHER.

Sworn to before me this 10th day of September, 1892.

ALBERT A. WRAY,
*Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

63 Supreme Court, County of Albany.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY for its Dissolution, &c.

GENTLEMEN: Please to take notice that Michael Moran, Peter Cahill, Cynthia Cahill and Jarvis Masters appeal to the court of appeals of the State of New York, from the order made herein by the general term of the supreme court in the third department, entered in the office of the clerk of Albany county, and dated the second day of July, 1892, affirming the order made herein at a special term of the supreme court, held by Mr. Justice Putnam, dated December 7, 1891, and entered in the office of the clerk of Albany county on February 8, 1892, enjoining and restraining the appellants from taking any further proceedings in the actions in the district court of the United States for the eastern district of New York in which libels have been filed by, or in behalf of said parties, and from taking any proceedings looking to the condemnation or sale of said steamboats, or any of them, and from each and every part of said order of affirmance.

Yours, &c.,

CARPENTER & MOSHER,
*Attorneys for Michael Moran, Peter Cahill, C. Cahill, and J. Masters.*

To the clerk of the county of Albany; James W. Eaton, Esq., att'y for Frank D. Sturgis, petitioner, respondent.

[Seal of Albany County, July, 1847.]

64 At a general term of the supreme court, third department, held at the city hall, in the city of Albany, on the 5th day of December, 1892.

Present: Hon. Stephen L. Mayham, presiding justice; Hon. John R. Putnam, Hon. D. Cady Herrick, justices.

In the Matter of the Application of a Majority of the Trustees of SHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters from the order of the said general term of this court, dated July 2nd, 1892, and entered in the office of the clerk of the county of Albany on the 9th day of July, 1892, to the said court of appeals, and that such order has been affirmed by said court with costs, and the record and proceedings have been directed by said court of appeals to be remitted to this court and this court directed to enforce the said judgment of the court of appeals according to law: Now, therefore, on motion of James W. Eaton, of counsel for the petitioner, Frank D. Sturges, receiver herein, it is

65 Ordered and adjudged that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that the said petitioner have execution against the appellants aforesaid for the costs when adjusted by the clerk and inserted in the judgment, and that this order or judgment be annexed to the judgment-roll.

(S'd) A. C. REQUA, *Clerk.*

66 Supreme Court.

In the Matter of the Application of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

*Judgment. Dec.* 6, 1892.

An order having been made by this court at an adjourned special term of the supreme court held at the city hall, in the city of Albany, on the 7th day of December, 1891, by Hon. John R. Putnam, justice, and entered in the office of the clerk of Albany county on February 8th, 1892, enjoining and restraining Michael Moran, Peter Cahill, Cynthia Cahill, Jarvis Masters, and others from taking any further proceedings in the actions in the U. S. district court for the eastern district of New York in which libels had been filed by or in behalf of said parties, and from taking any further proceedings looking to the condemnation and sale of the steamboats of said Schuyler's Steam Tow-Boat Company against which libels had been filed or any of them, and said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters having appealed from said order to the general term of this court, said order having been affirmed in all things by the said court at said general term by an order dated July 2nd, 1892, and entered with the clerk of the county of Albany on the 9th day of July, 1892, and said costs of said appeal having been taxed by consent at twenty-seven dollars,

67 and said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters having appealed therefrom to the court of ap-

peals, and the court of appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed and judgment rendered for the petitioner herein, Frank D. Sturges, receiver of said Schuyler's Steam Tow-boat Company, with costs, and the record remitted from that court having been filed and an order entered thereon making the order and judgment of the court of appeals the judgment of this court and directing the entry of a judgment of affirmance herein with the costs of said appeal against said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters, to be taxed: Now, on motion of James W. Eaton, attorney for said petitioner, it is—

Ordered and adjudged that the order in this action entered as aforesaid on the 8th day of February, 1892, be, and the same is hereby, affirmed.

And it is further adjudged that the petitioner, Frank D. Sturges, as receiver, recover of the said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters the sum of one hundred and fifty-three dollars, the amount of his costs herein as taxed, and that he have execution against said Michael Moran, Peter Cahill, Cynthia Cahill, and Jarvis Masters therefor.

(S'd) A. C. REQUA, *Clerk.*

STATE OF NEW YORK, }
*City & County of Albany, Clerk's Office,* } ss.:

I, James D. Walsh, clerk of the city and county of Albany and of the courts of record thereof, do hereby certify that I have compared the annexed copy of judgment-roll upon remittitur from the court of appeals with the originals thereof on file in this office, and that the same are correct transcripts therefrom and of the whole of said originals, together with the original writ of error, citation, and proof of service and copy of supersedeas bond prefixed and copy of opinion of the court of appeals annexed.

In testimony whereof I have hereunto set my hand and affixed my official seal this 9th day of February, 1893.

[Seal Albany County, July, 1847.]

JAS. D. WALSH, *Clerk.*

68 Court of Appeals.

*In re* Application of Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

NOVEMBER 29TH, 1892.

Joseph F. Mosher, Esq., for appellants.
James W. Eaton, Esq., for respondent.

PECKHAM, *J.:*

A receiver of the property and effects of the above-named corporation was duly appointed by a special term of the supreme court of

the State sitting at Albany on the 31st of July, 1891, and the order appointing him was filed and entered in the proper clerk's office August 1st, 1891, at 11 a. m. The receiver executed his bond, and it was duly approved August 3rd and filed in the clerk's office August 4th, 1891. The proceeding was one for the voluntary dissolution of a corporation and the distribution of its property and assets among those entitled to receive the same. Intermediate the time when the receiver was appointed and the execution and filing of his bond and in the afternoon of August 1st a Mr. Moran, in his own behalf and in behalf of other creditors of the corporation, libelled several vessels which were the property of the corporation by filing libels in the U. S. district court for the eastern district of New York, and upon process issued from that court the marshal took possession of such vessels.

69 When Moran instituted his proceedings he says he had been informed that application had already been made for the appointment of a receiver, but he was not informed and did not know that one had been appointed. Finding the marshal in possession of the vessels, and as he refused to give up such possession, the receiver instituted these proceedings to restrain the libellants from further steps in the U. S. district court. The courts below have granted the order restraining further proceedings and the other parties have appealed here.

The courts below have held that by the proper presentation of a petition to a State court praying for the dissolution of the corporation and by the appointment of a receiver upon due notice of the application to the attorney general the court acquired jurisdiction of the subject-matter of the proceedings and took the property of the corporation into the custody of the law for the purpose of due administration, and that having thus acquired jurisdiction of such subject-matter and taken the property into the custody of the law, although the receiver had not actually and physically seized and taken it into his manual possession, the State court acquired the exclusive jurisdiction and right to take such possession and make a final decree, and that the libellants acquired no rights under their process and should not be permitted to further proceed in the district court. The libellants, on the other hand, contend that this is a question of jurisdiction over the particular property, and that court obtains it which through its process and officer first actually seizes and takes possession of the property itself, and that

70 although the receiver may have had a prior right to take possession it was not exercised before actual possession was taken under the process from the U. S. court, and hence the first manual possession must determine the question of jurisdiction.

We think the contention of the libellants ought not to prevail. The question of the effect of the appointment of a receiver upon the title to the property of the person or corporation for which he was appointed is not a new one. In Mann *vs.* Pentz (1 Sand., ch. 257) it was said that when the appointment of a receiver was completed the title to all property and effects which were subject to the order

vested in him. To the same effect are Porter *vs.* Williams (9 N. Y., 142–148) and Van Alstyne *vs.* Cook (25 N. Y., 489–496).

The appointment of receiver is completed at the farthest by the filing and entering of the order appointing him, although before he proceeds to the discharge of his duties he may be directed to execute and file a proper bond. When that is done he can take actual, manual possession of the property, and his title relates back to the time of his appointment.

Matter of Christian Jensen Co., Limited, 128 N. Y., 550, and cases cited by Earl, J.

In Storm *vs.* Waddell (2 Sand., ch. 494) it was said that property that was liable to levy under execution at law could not be levied upon subsequent to an order appointing a receiver, as such order was equivalent to an actual levy upon the property.

I think the proposition involved in this case has been held adversely to the claim of the libellants by the decision in the
71 matter of Christian Jensen Co., Limited (*supra*).

The receiver was there appointed March 10, his bond filed March 11, and on March 12 he took possession of some of the property of the corporation. On the 11th of March intermediate the appointment and qualification of the receiver certain parties commenced an action against the corporation and sued out process in replevin in a New York district court, and under it took possession of certain property which was then in the possession of the corporation. On the same day an action against the corporation was commenced in the New York common pleas to recover a money judgment, and a warrant of attachment was issued, and the sheriff on the same day attached some of the property of the corporation. The receiver then asked for an order restraining the further prosecution of these actions, and after hearing the order was granted permanently restraining such proceeding. At the same time the court directed the sheriff, who had seized under his process in replevin certain property in the possession of the corporation, to surrender the same to the receiver.

Some question was made as to the right of the corporation to the possession of the property taken in replevin, but upon the facts it was held the receiver was entitled to possession, and if any question arose as to whether the property seized under the replevin writ actually belonged to the corporation at the time of the appointment of the receiver that question might be inquired of by some action or proceeding against the receiver commenced or taken with leave of the court. What was intended to be asserted was that the appointment of the receiver vested the property of the
72 corporation in him, although he was to thereafter qualify by giving a bond, and that the title being in him and the property in the custody of the law no other court could obtain jurisdiction over the property after such appointment, even under process upon which possession was taken prior to the qualifying of the receiver.

A different rule does not prevail because one court is a State and the other an United States court. It is a question of jurisdiction in each case and the same principles apply in both. The same rule obtains whether one court is of common-law or equitable jurisdiction and the other is a court of admiralty, although the nature of the jurisdiction of these courts is so different.

Mr. Chief Justice Taney in his dissenting opinion in Taylor *vs.* Carryl (20 How. U. S., 583–600) endeavored to establish that such a difference in the nature of the jurisdiction of common-law and admiralty courts over the vessel which was attached and libelled ought to make a difference in the decision to be made. The jurisdiction of the district court of the United States in that case was invoked for the purpose of collecting seamen's wages by the enforcement of the maritime lien upon the vessel given for that class of services, and it was said that such lien is by well-established authorities prior and paramount to all other claims on the vessel and must be first paid, and that by the Constitution and laws of the United States the district courts acting as courts of admiralty were the only courts which had jurisdiction over such lien or that were authorized to enforce it, and that it was the duty of that
72½ court to do it. The chief justice then argued that, as the attachment of the vessel under the State laws and by process from the State court only bound the interest of the owner while the maritime lien upon the vessel bound the *res* itself, the court which had jurisdiction only of a subordinate and inferior interest should not be able by virtue of such an attachment to close all proceedings to enforce the paramount lien for wages for twelve months, as by the laws of the State that period or more might elapse between the seizure of the vessel under the attachment and its sale or release from the process.

The case was decided upon what a majority of the court held was no new principle and it was solved by the application of what was said to be a principle that was comprehensive and just and equal and opposing no hindrance to the efficient administration of judicial power. The jurisdiction of the State court was upheld, notwithstanding its limited character, and that of the admiralty court was denied, although it was the sole court where the lien of the seaman for his wages could be originally enforced against the vessel itself. The case shows that the fact that the different courts in the Christian Jansen Co. case (*supra*) were courts of the same State and of concurrent jurisdiction is immaterial, and the same rule would hold if one court were a State and the other an United States tribunal.

The cases cited by the counsel for these appellants do not
73 involve the question as to the effect of the appointment of a receiver in an action or proceeding where the court has obtained jurisdiction by the proper service of papers. This court has held that the effect is, in a case of this kind, to take the property of the corporation into the custody of the law and that the court has power to preserve and protect it. As was said in Heidritter *vs.*

Elizabeth Oilcloth Co. (112 U. S., 305), "When the object of the action requires the control and dominion of the property involved in the litigation that court which first acquires possession or that dominion which is equivalent draws to itself the exclusive right to dispose of it." That dominion was acquired by the order appointing the receiver in this proceeding.

The same principle was declared in Rookford *vs.* R. R. Co. (6 Biss., 197), Steele *vs.* Sturges (5 Abb. Pr., 442), Texas Trunk R. R. Co. *vs.* Lewis (81 Texas, 1).

Different considerations apply upon a motion to punish as for a contempt an alleged interference of a third person with property in regard to which a receiver may have been appointed, but which he has not yet taken actual possession of. In the case of Albany City Bank *vs.* Schermerhorn (9 Pai., 372) the chancellor reversed the decree of the vice-chancellor adjudging the appellants to be in contempt because the facts were not sufficient to enable the chancellor to judge whether the parties were or were not in contempt. The question was one of procedure, whether it was proper to proceed as for a contempt for the purpose of enforcing the actual delivery of property to the receiver. The court held such proceeding was improper where the receiver had never had actual
74 possession, although his right to possession flows from the order appointing him. The question now before the court was neither involved, discussed, nor decided in the case cited. A party might not be guilty of contempt in taking control of property not actually seized by the receiver and while such party was in ignorance that a receiver had been appointed, and yet the property this interfered with may, notwithstanding, have been in the custody of the law, and jurisdiction over it may unquestionably have existed in the court which appointed the receiver.

Our decision here does not affect the legal rights of the libellants in the vessels in question. The receiver will be obliged in this proceeding to distribute the proceeds arising from a sale of the property among the creditors of the corporation as their priority of rights may appear and be held valid.

We think the order was right, and it must be affirmed with costs.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

75 [Endorsed:] Court of appeals. *In re* application of trustees of Schuyler's Steam Tow-boat Company, a corporation, for its dissolution. Opinion. Carpenter & Mosher, attorneys for —— ——, 62 Wall street, New York city. Service this day of a copy of the within — is admitted. Dated N. Y., —— —, 189–.

SIR: Please to take notice that a —, of which the within is a copy, made in the within-entitled cause, was this day — in the office of the clerk of the —, at the county court-house, in the city of ——.

Dated —— —, 189–.

Yours, &c., CARPENTER & MOSHER,
*Attorneys for* ——.

Endorsed on cover: Case No. 15,262. New York supreme court. Term No., 892. Michael Moran, Peter Cahill, Cynthia Cahill, & Jarvis Masters, plaintiffs in error, *vs.* Frank D. Sturges, as receiver of Schuyler's Steam Tow-boat Company. Filed February 18th, 1893.

# Supreme Court of the United States.

**No. 302.**

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL and JARVIS MASTERS,

*Plaintiffs in Error,*

*vs.*

FRANK D. STURGES, as Receiver of SCHUYLER'S STEAM TOWBOAT COMPANY.

*In Error to the Supreme Court of the State of New York.*

## BRIEF AND POINTS FOR PLAINTIFFS IN ERROR.


ROBERT D. BENEDICT,
JAMES EMERSON CARPENTER,
JOSEPH F. MOSHER,

*Of Counsel.*

CARPENTER & MOSHER,

*Attorneys for Plaintiffs in Error.*


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...n the
Eastern

# Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 892.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL and JARVIS MASTERS,
Plaintiffs in error,

*vs.*

FRANK D. STURGES, as Receiver of Schuyler's Steam Towboat Co.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

## Brief for Plaintiffs in error.

### PROCEEDINGS IN THE CASE.

This case was begun by a petition addressed to the Supreme Court of the State of New York, by Frank D. Sturges, Receiver of Schuyler's Towboat Co. (Record, fols. 17 to 28), in which he asked that the plaintiffs in error herein might be enjoined from prosecuting libels which they had filed in the District Court of the United States for the Eastern District of New York.

The libels in question, as appeared by the petition, had been filed against the steamboats Syracuse, Belle, Niagara, C. Vanderbilt, Niagara and Jacob Leonard. On those libels processes had been issued to the Marshal of the United States, and he had seized and still held the vessels under such processes.

Affidavits and other papers were attached to the petition, and on it a Judge of the Supreme Court of the State issued an order on Nov. 11, 1891, that these plaintiffs in error show cause at a Special Term of the Court, why they should not be enjoined from taking any further proceedings in those actions in the U. S. District Court (fols. 14 to 16).

Affidavits in opposition were presented by the plaintiffs in error on the hearing of the order to show cause (fols. 40 to 49).

Judge Putnam, who held the Special Term, on the 7th of Dec. 1891, granted the prayer of the Receiver and entered an order accordingly (fols. 49 to 52), filing an opinion (fols. 52 to 60).

The plaintiffs in error appealed from that order to the General Term (fol. 60), which affirmed the order (fol. 61) without an opinion (fol. 62).

They then appealed to the Court of Appeals (fol. 63). That Court affirmed the order of the General Term (fol. 64), and directed that its judgment be made the judgment of the Supreme Court; and thereupon, on the 6th of December, 1892, the judgment was entered whereby the order of the Special Term, made on the 8th of February, 1892, (by which the plaintiffs in error were enjoined and restrained "from taking any further proceedings in actions in the United States District Court for the Eastern District of New York, in which libels had been filed by or in favor of said parties) be affirmed, and that the petitioner recover of the present plaintiffs in error, the sum of $153, his costs as taxed, and have execution therefor."

The opinion of the Court of Appeals is found at fols. 68–75. From this final judgment in the proceeding the present plaintiffs in error have taken out this writ of error.

## Facts out of Which the Case Arose.

Schuyler's Steam Tow Boat Company was a corporation organized under the laws of New York.

On July 31, 1891, the trustees of the company presented to the Supreme Court of the State of New York, in Albany County, a petition for voluntary dissolution of the corporation under sections 2419 to 2423 of the Code, and in and by their petition prayed for the appointment of a temporary Receiver under section 2423, as amended (fols. 36 to 40) whose powers and duties are specified in section 1788.

Thereupon the Justice presiding signed an order to show cause, before a Referee therein named on November 16, 1891, why the company should not be dissolved, and by the same order appointed Frank D. Sturges, Esq., temporary Receiver of the property of the corporation "with all the powers "and subject to all the duties that are defined as "belonging to temporary Receivers appointed in an "action in section 1788 of the Code" (fols. 23 to 36).

The language of that section of the Code is as follows:

"A temporary Receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property and proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the Court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding for either of those purposes. He

must qualify as prescribed by law for the qualification of a permanent Receiver."

This order was entered and the petition and accompanying papers were filed in the office of the Clerk of Albany County, in the forenoon of August 1, 1891 (fol. 29).

On August 3, 1891, Mr. Sturges executed his bond with sureties, and the bond was approved by a Justice of the Supreme Court. It was filed in the office of the Clerk of Albany County on August 4, 1891 (fols. 18, 29).

Meanwhile, on the afternoon of August 1, 1891, (which was Saturday), and on Monday, August 3, 1891, the present plaintiffs in error, Michael Moran and others, co-owners of sundry tugs, filed certain libels in admiralty in the District Court of the United States for the Eastern District of New York against certain steamboats, which were the property of Schuyler's Steam Tow Boat Company. Process was issued under said libels to the United States Marshal for that District, and on August 1st he seized and took into his possession and custody under such processes the steamboats Niagara, Belle and Syracuse, and affixed his notice of seizure thereto, and on August 3d he seized and took into his custody the steamboats Vanderbilt, Jacob Leonard and America, and affixed his notice of seizure thereto (18, 19).

On August 4th, 1891, Mr. Sturges went on board the steamboats above mentioned, and ascertained that the Marshal was in possession thereof by his keepers, and he also found affixed to the boats the Marshal's notice of seizure (19, 20).

Certain allegations were made in the petition in the present proceeding, and the moving affidavits of knowledge by Mr. Moran at the time when he filed the first libels, that a Receiver of the company had been appointed. These are fully denied, and all his information and sources of information on the subject of the proceedings taken or contempla-

ted to dissolve the company, with the dates, are set forth in his affidavit (40 to 43). The Court of Appeals accepted his statement on this point as correct (fol. 69), and these matters are immaterial to the question of the Receiver's right to the injunction.

In September the Receiver made a motion in the United States District Court for an order directing the Marshal to withdraw from the custody of the steamboats held under the admiralty process, which motion was made upon substantially the grounds of the motion for injunction of the present case. The motion was denied, on the ground that the question should be raised by answer to the libels, and leave was given to answer accordingly (fol. 26).

The Receiver availed himself of this permission and appeared in one action against each vessel, and filed his answer, contesting the jurisdiction of the Admiralty Court (fol. 26). He thereafter made an application to this Court for a writ of prohibition to the District Court which this Court denied (140 U. S., p. 484).

Afterward, and on November 11, 1891, the Receiver took these proceedings, the particulars of which are above set forth.

## Assignment of Errors.

The errors assigned by the plaintiffs in error are as follows:

*First.*—The State Court erred in making the original order to show cause why the plaintiffs in error should not be enjoined.

*Second.*—The State Court erred in making the order enjoining the plaintiffs in error.

*Third.*—The State Court erred in affirming that order granting an injunction.

*Fourth.*—The State Court erred in holding that the Marshal had no right to seize the property in question.

## First Point.

**The State Court had no authority to make an order or give a judgment enjoining the plaintiffs in error from prosecuting the suit which they had begun in the United States District Court.**

The above proposition is maintained both on principle and on authority.

(*a.*) The Constitution of the United States, Article 6, provides that "this Constitution and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." The Constitution and the Laws of the United States being the supreme law of the land, the Courts of the United States, which are to enforce those laws, must have, within the scope of such enforcement, higher power than the Court of a State. That higher power is also implied in the provisions of law allowing an appeal to the Supreme Court of the United States from judgments of Courts of a State, in cases involving laws of the United States, in pursuance of which provisions this appeal has been brought before this Court.

It would seem to follow as a necessary consequence that the Courts of inferior jurisdiction could not have the power to enjoin proceedings in the

Court of superior jurisdiction. In cases where the question of jurisdiction between a Court of lower and a Court of higher jurisdiction is involved, it must always devolve upon the Court of higher jurisdiction to determine that question of jurisdiction. And it must follow, therefore, where there is a question of jurisdiction between a Court of the United States and a Court of a State that, on general principles, the question of jurisdiction should be determined by the Court of the United States.

Such is the present case.

The question is which Court, as between the State Court and the United States Court, had jurisdiction. And that question, therefore, is one which should properly devolve on the Courts of the United States to determine.

(*b.*) This has been held in a long series of cases. We quote the following language of this Court in the case of Buck *vs.* Colbath (3 Wall., 334), which is directly on this point:

"No doubt, if the Federal Court had no jurisdiction of the case, the process would be invalid and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of the process. The effect of the principle stated by Chancellor Kent, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the Federal Court, as a moment's consideration will show. It would draw after it into the State Courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the Federal Courts, including the admiralty, for this Court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final process of the person in both civil and

criminal cases; for in every case the question of jurisdiction could be made; and until the power was assumed by the State Court, and the question of jurisdiction of the Federal Court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark, that no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

Again, in the case of Riggs *vs.* Johnson County, 6 Wall., p. 195, *et seq.*, this Court used language which completely covers this question, namely: "State Courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in national Courts. Circuit Courts and State Courts act separably and independently of each other," (and this language is as applicable to the Admiralty Courts of the United States as it is to the Circuit Courts) "and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye. * * * Viewed in any light, therefore, it is obvious that the injunction of a State Court *is inoperative to control or in any manner to affect the process or proceedings of a Circuit Court*, not on account of any paramount jurisdiction in the latter Courts, but because, in their sphere of action, Circuit Courts are wholly independent of the State tribunals." (This language, also, is equally applicable to the Admiralty Courts.)

Nor was this new doctrine. It was laid down in Story's Equity Jurisprudence, in which, after stating the doctrine that an Equity Court of a State has the power to enjoin a citizen of the State from suing before a foreign tribunal, Judge Story

says (Eq. Jur., § 900): "There is one exception to this doctrine which has been long recognized in America, and that is that the State Courts cannot enjoin proceedings in Courts of the United States, nor the latter in the former Courts."

On this proposition the following cases are cited, which, as well as the cases above quoted, fully sustain it:

English *vs.* Miller, 2 Rich. Eq., 320.
U. S. *vs.* Keokuk, 6 Wall., 514.
Strozier *vs.* Hows, 30 Ga., 578.
Bryan *vs* Hixson, 40 Ga., 405.
Hines *vs.* Rawson, 40 Ga., 356.
Kendall *vs.* Winslow, 6 R. I., 453.
Daly *vs.* Sheriff, 1 Woods, 175.

Willard's Equity Jurisprudence (Potter's Ed.), 348, uses the same language, and cites additional cases.

(*c.*) The Court of Appeals, in its decision in this case, does not seem, as far as its opinion shows, to have considered this question. It has assumed that the question was one for its decision and proceeded to decide that the State Court had the jurisdiction.

The Judge who decided the matter at Special Term, however, did consider this question, and it is discussed in his opinion (fols. 54–5), in which various cases are cited as authority. But those decisions do not sustain the proposition which he asserted.

Judge Putnam takes as his leading authority the case of Dehon *vs.* Foster, from which he quotes and says that the other cases which he cites sustain it.

But Dehon *vs.* Foster did not consider the question at all. It considered only the question of enjoining parties from suing in foreign Courts, which can have no power over our State Courts,

and it cites Story's Equity Jurisprudence to that effect at Sec. 898, 899, without any allusion to the express exception of the Courts of the United States in Sec. 900 above quoted.

Of the other cases cited by Judge Putnam, not one is a case decided in a Court of the United States. They are all decisions of the Courts of the State of New York And, moreover, only one of them had any reference to a suit in a Court of the United States, and that one did not at all present the question we are considering.

Dinsmore *vs.* Neresheimer was the case of an injunction to restrain the prosecution of suits in a Court of the District of Columbia, which was considered as a State. Judge Daniel cites Story's Eq. Jurisprudence, § 899, but makes no reference to § 900, where the exception is made as to the Courts of the United States.

Dehon *vs.* Foster was an injunction against the prosecution of a suit in a foreign country. The same reference is made to § 899 of Story's Eq. Jurisprudence but not to § 900.

The Atty.-Gen. *vs.* Ins. Co. was an injunction against the prosecution of a suit in another Court of the State of New York.

Vail *vs.* Knapp was an injunction to restrain the prosecution of a suit in a Court of Vermont. It was placed on the authority of the same § 899 of Story's Eq. Jurisprudence and of Dehon *vs.* Foster.

The question of the Courts of the United States was not involved.

Claflin *vs.* Hamlin was a similar case and was decided on the same authorities.

Barry *vs.* Brune is the only case cited in which a suit in a Court of the United States was involved, and that case is so different from this as to furnish no authority for this case. The question involved was as to the right to policies of life insurance issued by the Mutual Life Insurance Co. Brune had

assigned the policies to Whitredge, who had sued the Co. on the policies in the U. S. Circuit Court of Maryland and obtained judgment. The New York Court held that Barry was entitled to the policies and, of course, to the judgment, and enjoined the defendants from collecting the Maryland judgment. There was no question of a conflict of jurisdiction involved.

The People *vs.* Erie R R. Co. was a case in which three Receivers of a Railroad Co. had been appointed, two by the Supreme Court of the State and one by the United States District Court, but all in actions brought by stockholders. The Attorney-Gen. then began an action, also in the Supreme Court, but in another district, for the same purpose, and asked for an injunction to prevent the Railroad Co. from delivering possession to any of the three Receivers.

The Court at Special Term held that a Receiver could not be properly appointed in an action brought by a stockholder, and issued an injunction as prayed for.

And this case, in which the Court enjoined the defendant from *delivering possession of its property* to either of three Receivers which had been appointed, is gravely cited as authority for the proposition that as soon as a Receiver is appointed he has the possession, and no process or order of another Court can affect it!! The case is a threefold authority to the contrary.

Judge Putnam proceeds to say that his decision does not conflict with the language of this Court in the case of Riggs *vs.* Johnson Co. (6 Wall., 106), for two reasons:

1st. Because the injunction asked for is not to be directed to the Federal Court but to a party to an action therein.

But no distinction can be made between enjoining a party to an action in a Court and enjoining the Court itself, as far as the reason-

ing of this Court is concerned. If the Court of a State can, by its injunction, enjoin a citizen of the United States from pursuing his rights before a Court of the United States, it makes no difference that it does not direct its writ to the Court. Its control over the proceedings of the Courts of the United Sates is absolute, if it may by injunction prevent a citizen of the United States from proceeding to enforce before them, the rights which he claims under the laws of the United States.

And again this distinction has been condemned by this Court.

"The fact that an injunction issues only to the parties before the Court and not to the Court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Peck *vs.* Jenness, 7 How., 625.

"The injunction of a State Court is inoperative to control or *in any manner to affect the process or proceedings of a Circuit Court*" (6 Wall.,196). And the cases in which this Court has announced this proposition have been cases in which the action of the State Court has been directed, not against the United States Court, but against its officer or a party proceeding before it.

2. The second reason given by Judge Putnam for making this case an exception to the general language of this Court in Riggs *vs.* Johnson Co. is, as he says: "Because the State Court had acquired jurisdiction."

But that is the very question involved. To claim "That the State Court has power to determine the question whether it has jurisdiction, *because it has jurisdiction*," is arguing in a circle.

The Judge failed to see that the determination of

the question "which Court *has power to decide* the controverted question, whether the jurisdiction of the cause was in the State Court or the United States Court," is first to be determined. When that is settled, it will be proper for the proper Court to decide which Court has jurisdiction of the cause. But a decision of this latter question has no bearing on the former one. Judge Putnam's second reason, therefore, was of no force.

The language of this Court in Riggs *vs.* Johnson Co.: "The injunction of a State Court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court," repeated in U. S. *vs.* Council of Keokuk (*Id.*, p. 517), was conclusive against the power of the State Court to issue its writ enjoining these appellants from prosecuting before a Court of the United States the rights which, as citizens of the United States, they were entitled to prosecute before such Court.

The judgment, therefore, should be reversed on this ground, if on no other.

## Second Point.

**The pendency of the action in the District Court of the United States was a defense to this proceeding.**

(*a.*) The Receiver in his petition for this order of injunction, alleged that, in the action pending in the District Court of the United States, he had appeared and had set up by answer as a defense the very fact on which he based his petition (fol. 26).

(*b.*) It thus appeared that there was another action pending in another Court between the same parties and involving the same question, *at the time this proceeding was begun.*

(*c.*) The pendency of another suit between the same parties and involving the same matters is a good plea in abatement to a new suit (3 McLean, 221).

(*d.*) But here no *plea* was necessary, because the pendency of such suit was averred by the Receiver himself.

(*e.*) This rule is founded in good sense.

If either party to a controversy has the right to choose the jurisdiction by which such controversy is to be determined, it must be the plaintiff. A defendant who has come into an action should not be allowed to take the controversy out of such jurisdiction into another, by a writ of injunction issued from such other jurisdiction directed to the plaintiff enjoining him from going on in the jurisdiction before which both were already present.

## Third Point.

**The jurisdiction of the District Court to determine the question in controversy has been already determined by this Court in favor of the plaintiffs in error.**

After the Receiver had appeared in the Admiralty Court and made his motion in September, 1891, for an order directing the marshal to withdraw (Record, fols. 25-6), which was denied by that Court, he applied to this Court to prohibit the District Court from proceeding in the causes on the ground of want of jurisdiction in that Court. This Court denied the petition without any opinion, "but the ground of the denial was that *the matter was in course of litigation in the District Court on due process*" (142 U. S., p. 484.)

The same facts were there presented, as are now presented, and this Court decided that the District Court *had the jurisdiction.*

It can never be allowed that, after such a decision by this Court, a State Court could be allowed to enjoin the party from prosecuting those suits, on the ground that the District Court *did not have jurisdiction.*

The decision of this Court on that point does not seem to have been brought to the attention of the Courts of the State. But nevertheless it is controlling—equally so—on the parties to this controversy before whatever Court they are contesting the question.

## Fourth Point.

**Beyond the question as to which Court has the jurisdiction to determine the question of jurisdiction over the cause, the conclusion must be that the District Court of the United States had jurisdiction over it because it had acquired rightful possession of this property by the seizure of it by the Marshal under his process.**

We say rightful possession. That the marshal acquired actual possession is not disputed. That the Receiver obtained actual possession is not claimed.

The claim of the Receiver is that he had *constructive possession*, and that, as between the constructive possession which he had and the *actual* possession which the marshal had, his *constructive* possession gave jurisdiction and the actual possession of the marshal was wrongful.

The plaintiffs in error claim that the actual and exclusive possession of the property by the marshal determines the controversy here.

(*a.*) The cases in which the question between the jurisdiction of a State Court and that of a Court of the United States have come before this Court for consideration have been of different classes, but the decision has been uniformly the same. viz.: that the *possession* which was subsequently obtained must yield to the *possession* which was prior, and that the Court which obtained such prior *possession* must retain the controversy.

In Hagan *vs.* Lucas, 10 Peters, 400, slaves had been levied on by the sheriff, afterwards levied on by the marshal, and suit brought to try title.

The ground on which the marshal claimed to levy was that subsequent to the sheriff's levy the slaves had been delivered by him to Lucas on his giving bond to return them.

This Court said "On giving of the bond the property is placed in the *possession* of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff." And the decision of this Court was that the marshal could not levy because the property was in the *possession* of the sheriff.

In the case of Wiswal *vs.* Simpson, 14 How., 54, the marshal had levied on real estate, but took no possession of it. Before a sale by the marshal, a Receiver was appointed by a State Court, who *took possession* of the property. There was a sale of the property by the marshal and also by the Receiver, and the question was, which carried the title. The fact that the Receiver had taken *possession* of the property was not questioned, nor was his right to take possession of the property, notwithstanding the levy by the marshal. The sole question was whether the marshal could sell property which was not in his possession, but in the

*possession* of the Receiver. This Court held that he could not. The fact of *possession* was the determining fact in the case.

The next case is Taylor *vs.* Carryl, 20 How., 583.

In this case the sheriff of the State Court had attached a vessel and had her in possession. Thereafter the marshal undertook to seize, under warrant in an admiralty suit. There was a sale by the sheriff, and a sale by the marshal, and a suit was brought to try the title. The Court decided against the right of the marshal because the sheriff had *actual possession*. The Court cited an opinion of Lord Edinborough to the effect that "where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectually and for the purposes bound, by the authority which *first actually attaches* upon them in point of execution, and under which the execution shall have been first executed.

This Court further said, quoting from another opinion: "Neither can one take property *from the custody* of the other by replevin or any other process, for this would produce an effect extremely embarrassing for the administration of justice" (p. 597).

The next case was Freeman *vs.* Howe, 24 How., 450. In this case the marshal had attached property under a process from the United States Court. The sheriff, under a writ of replevin from a State Court took the property from the marshal's hands. The Court decided that the property could not be taken from the possession of the marshal under replevin proceedings issuing from a State Court. The case was not put at all on the question of his title to the property, but merely on the ground that, whatever was the title, the *actual possession* by the marshal prevented its being interferred with by a process issuing from the State Court.

The next case was Buck *vs.* Colbath (3 Wall.,

336), Buck, marshal, had attached goods under a warrant, not against Colbath. Colbath sued Buck for trespass in the seizure.

The claim was made by the marshal that under the authority of the previous cases he could not be sued in a State Court in trespass, any more than the property could be taken out of his hands by replevin from a State Court. But this Court distinguished the two cases on the sole ground that one involved the fact of *possession* while the other did not.

Again in Riggs *vs.* Johnson Co. (6 Wall., 196), this Court said :

"Undoubtedly Circuit Courts and State Courts in certain controversies between citizens of different States are Courts of concurrent and co-ordinate jurisdiction, and the general rule is that as between Courts of concurrent jurisdiction the Court that first obtains *possession* of the controversy or of the property in dispute must be allowed to dispose of it without interference or molestation from the co-ordinate Court. Such questions usually arise in respect to property attached on mesne process or seized on execution, and the general rule is that where there are two or more tribunals competent to issue process, to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first *attached or seized.*"

The next case was Covell *vs.* Heyman, 111 U. S., 176. The marshal levied on property on execution against A. Replevin was brought by B. Held, that the marshal having the *possession* of the goods, they could not be replevied by a State Court.

The next case was Heidritter *vs.* Eliz., &c. Co., 112 U. S., 305. The marshal seized a distillery under attachment, and sold it under execution.

Sheriff afterwards sold it under execution in a suit brought to enforce mechanics' liens, which

liens dated before the marshal seized. Held, that as the Marshal *had possession* the Sheriff could not sell the land or give a title to it.

The Court used this language: The District Court "had taken *possession of the property itself*, and that possession was necessarily exclusive."

And in the very recent case of Byers *vs.* McAuley (149 U. S., p. 614), this Court said: "It is a rule of general application that when property is in the actual possession of one Court of competent jurisdiction, such possession cannot be disturbed by process out of another Court. The doctrine has been affirmed again and again by this Court."

Citing the cases above named and others.

(*b.*) Other cases have come up in the lower Courts, in which the same criterion has been applied.

The Caroline, 1 Low, 174. Attachment by Sheriff of credits and effects, to wit: freight. Process afterwards issued to marshal against the freight. Held, that as under the Massachusetts law the Sheriff did not *have the custody* by attaching, the freight must be brought into the U. S. Court.

Adler *vs.* Roth, 5 F. R., 895. Attachments issued to marshal and Sheriff on the same day. Sheriff saw property first, but did not take it into his possession. Marshal came afterwards but took it into his possession.

Held, that the marshal had the right to hold it, and would not be ordered to withdraw.

Senior *vs.* Pierce, 31 F. R., 625. Pierce seized under State warrant a quantity of liquors. Replevin issued to marshal, and Pierce refused to let him take the property. Application to punish Pierce for contempt denied.

The E. L. Cain, 45 F. R., 367. In this case a Sheriff had attached a tug, and had turned it over to a Receiver appointed by a State Court. After

that marshal under the warrant seized her. The Receiver (apparently) appeared in the U. S. Court case, and excepted to its jurisdiction. The Court said: "This tug having been *taken possession of* by process of the State Court, and by that Court placed in the custody of its Receiver, it cannot be held by any process out of this Court until discharged by order of the State Court."

But the Court retained possession of the cause, staying proceedings only till the State Court had got through with the tug.

(*c.*) An effort is made to distinguish this case from cases above cited on the ground that the petitioner in this case is a Receiver appointed by the Supreme Court of the State.

But that is not a new element in the question. It came up before this Court as long ago as the case of Beaston *vs.* The Farmers' Bank, 12 Pet., 102.

In that case the Sheriff of the State had attached the property of a debtor in the hands of Beaston, a garnishee, in September, 1830.

In April previous a bill in equity had been filed in the U. S. Circuit Court, and Receivers of the property of the debtor had been appointed, and it was claimed that the attachment subsequent to the appointment of the Receivers was invalid. But the Court held that as the Receivers *had not obtained possession* the attachment was valid (p. 110), and this Court affirmed the judgment.

The rights of a Receiver were also involved in the case of Wiswall *vs.* Simpson, above cited (14 How., 54), but, as stated above, this Court placed its decision solely on the fact of *possession* by the Receiver.

And see Porter *vs.* Sabin, 149 U. S., 479.

(*d.*) The State Courts in the case at bar have apparently considered that the controlling fact was *title*

instead of possession. Thus, Judge Putnam says (fol. 57): "The doctrine is laid down in the Jensen case and other cases above cited, that the *title vested* in the Receiver on entering the order, and from that time the property was in the custody of the Court. * * * The *title being vested* in the Receiver on the entry of the order, and hence in the hands of the Court, may not be interfered with afterwards by any creditor in any Court, State or national."

So the Court of Appeals says (fol. 70): "The question of the effect of the appointment of a Receiver upon *the title* to the property of the person or corporation for which he was appointed is not a new one." * * * When his bond is filed "he can take actual manual possession of the property, and his *title relates back* to the time of his appointment."

These Judges do not seem to have appreciated two things:

1. That in determining controversies between the State Courts and the Courts of the United States, as to which Court had jurisdiction of property, this Court has always declared that the fact of possession and not that of title was conclusive. Time and again, in such controversies, has this Court refused to consider the question of title.

Freeman *vs.* Howe, 24 How., 450.
Covill *vs.* Heyman, 111 U. S., 176.

2. In the case at bar, the question of *title* to the property was immaterial. The title to these steamboats might have been in the corporation or not—it might have passed out of the corporation in any way, by voluntary conveyance or by sale under execution, and yet the right of the libellants to take the very proceeding, which they did take against the boats, would remain unaffected.

Not so in the Jensen case which is relied on by

the Court below. If the *title to* the property of the corporation in that case vested in the Receiver *at the time of his appointment*, as the Court held it did, and if the attachment (which was directed against the property of the *corporation*) was not levied till *after* such appointment had been made; it followed necessarily that the Sheriff did not have in his hands, under his attachment, any property which was subject to that attachment; and he was, therefore, properly directed to turn over to the Receiver, *the Receiver's* property which he was holding under an attachment against the property of the corporation, which had no property.

But in this case at bar, a change of *title* did not affect the right of the libellants to sue, or the right of the marshal to seize, because his process ordered him to seize and hold these particular boats, without reference to the title at all. If the Receiver had obtained *possession*, then under the decisions of this Court, the marshal could not have interfered with that *possession*. But it was only possession instead of title which could affect the power of the marshal to seize. And that possession, if the Receiver had obtained it, could only have suspended, not destroyed, the libellants' rights. (The E. W. Cain, 45 F. R). Without that possession the libellants' rights were unaffected.

(*e.*) There is one case decided by a Court of the United States in which a controversy had arisen between two Receivers, in which the Circuit Court of the United States, while coming to the same conclusion which this Court had always announced, placed it on a different ground.

Gaylord *vs.* Fort Wayne &c. R. R., 6 Bissell, 286.

In that case a bill in equity had been filed in the U. S. Circuit Court asking for a Receiver. It was objected to for form, and while that objection

was being disposed of, a similar bill was filed in a State Court and a Receiver was appointed by that Court. Subsequently the U. S. Circuit Court appointed a Receiver and he *obtained possession* of the property. Thereupon the State Court Receiver applied to the U. S. Court to rescind its order for a Receiver and direct its Receiver to deliver the property to him. The U. S. Circuit Court declined to do so. Manifestly it might simply have said that as, under the decisions of this Court, the question was to be determined by the fact of possession and as its Receiver had possession, it would not turn him out, but would leave any one, who wanted to try his title, to come in and try it as advised.

But it did go farther and decided another point, not at all involved here, that, as the bill was first filed in the United States Court, that Court had the prior right *to appoint a Receiver*. And it used, in giving its decision, the following language:

"We think that there is no other safe rule to adopt, in our mixed system of State and Federal jurisprudence, than to hold that the Court which first obtains jurisdiction of the controversy, and thereby the *res*, is entitled to retain it until the litigation is settled" (p. 291).

In that word "thereby" lurks the whole fallacy. This Court has always refused to hold that the Court did obtain the *res* "thereby." It had always held that question of the origin of the controversy to be immaterial on the point of jurisdiction.

(*f.*) Stress is laid in that case, as also in the previous case of Union Trust Co. *vs.* Rockford &c. R. R. Co., in the same volume of Bissel's Reports at p. 197, where similar views were presented, upon the fact that the bills had been filed in two courts *of concurrent jurisdiction*, and therefore that Court had the prior right to appoint a Receiver in which a bill was first filed. But that element is not found in the case at Bar. These are not Courts of concurrent jurisdiction; and manifestly no such rule has

yet been approved by this Court, which has always placed its decisions upon the fact of prior possession of the property, not on the date of the issuing of the writ, much less on the date of the commencement of the respective suits.

And so far as the criticism is concerned that there would be danger of a race for possession, how is it any better to substitute for a race for possession a race to file a bill in different Courts at different places, the success of which might depend upon the accuracy of the watches of the racers?

And it is manifest that, if any such rule as that is to be applied to this case, it will be setting up an entirely new criterion by which to determine these controversies between the State jurisdiction and that of the Admiralty.

If the marshal's seizure of a vessel, under the warrant of a Court of Admiralty against her, is to be held unauthorized, because some creditor of her owner has, before such seizure, filed somewhere a bill in equity asking a Court to appoint a Receiver of her owner's property, owners of vessels may well keep such bills on file in some distant Court for use, if occasion requires, as a spare anchor might be.

## Fourth Point.

**If the Receiver was in possession from the time of making the order appointing him, it must follow that any interference with the property after that time was a contempt of Court, for it was a disturbance of the possession of the Court through its officer.**

**But if we find that such interference in advance of actual possession by the Receiver is not punishable as a contempt, then we must conclude that the order did not vest the possession, but only the right to acquire possession.**

The case of *Albany City Bank* vs. *Schermerhorn*

(9 Pai., 372) is decisive of this point. That was a case of a creditor's bill. A Receiver was appointed and the appointment was perfected by giving bond, &c. A part of the property of the defendant consisted of lands rented out by the defendant on shares. Subsequent to the perfecting of the appointment of the Receiver, a judgment creditor issued executions to two counties, under which the Sheriff levied upon the defendant's share of the crops. A motion was then made before the Vice-Chancellor to attach the Sheriffs for their alleged contempt in levying the executions. It was objected that the judgment debtor had not executed any assignment of his property to the Receiver; that the Receiver had not served upon the tenants copies of the order appointing him Receiver, and that the tenants had not attorned to him. The facts were not disputed; but the Vice-Chancellor held that none of the objections were well taken in law. With respect to the want of attornment he said: "By the appointment of the Receiver, and "perfection of the appointment, the property "passes under the control of the Court; and the "Receiver as its officer must *by virtue of such* "*appointment* be deemed *to be in rightful posses-*"*sion* of the property of the judgment debtor, at "least as against other judgment creditors," *being* "*in such possession*, no other person can interfere "with it without a contempt of this Court" (p. 302). He therefore granted the motion, and directed attachments to issue against the Sheriffs, unless they should restore the property to the Receiver and pay costs.

[It will be observed that the Vice-Chancellor took the view of the counsel for the Receiver and of the Court at Special Term in the present case.]

The Sheriffs appealed from the order adjudging them in contempt. Chancellor Walworth reversed the order, and held that the facts were not sufficiently ascertained in the papers upon which the

final order was made to enable him to decide whether the appellants were actually in contempt, or, if so, to what extent ; and he remitted the proceedings to the Vice Chancellor, with directions to take further proofs, by interrogatories or otherwise, and thereupon to decide the question of contempt. But he overruled the Vice-Chancellor's decision that the mere appointment of the Receiver and perfection of the appointment put him in possession as against third parties, and instructed him as to how he should decide the question of con empt as follows :

"The right to proceed against the appellants as for a contempt, however, depends upon the question whether the Receiver, either by himself or his agents or tenants, was *in possession* of the property at the time it was seized by the appellants, and not upon the mere right of the complainants to reach such property by a creditor's bill. The Court will not let the possession of the Receiver, which is that of the Court itself, be disturbed by any one without its permission. Nor will this Court, where it has made an order for the appointment of the Receiver of real estate, and the tenants have attorned to such Receiver under the order of the Court, permit the tenants or any other persons to question the right of the Court to grant such receivership by disturbing the possession of its officer. If the tenants had attorned to the Receiver, or had agreed to account to him for the share of the crops, &c., belonging to the landlord before the sheriffs levied their executions thereon, the appellants were not authorized to disturb such constructive possession of the Receiver, and they may be compelled to restore the property or the value of it in this summary way. On the other hand, if the Receiver *was not in possession, either by himself or his tenants by attornment, or by his agents, he cannot enforce a delivery of this property to him by proceedings as for a contempt* against the sheriffs who have

levied thereon, although he may have an equitable right to recover the same by a bill in this Court founded upon the previous order to appoint a Receiver" (377, 378).

Albany City Bank *vs.* Schermerhorn, 9 Paige, 372.

It thus appears that the Vice-Chancellor was in error in holding that the order appointing the Receiver and the perfecting of his appointment vested him with both the title *and possession*; and that the taking possession of tangible property under process after the appointment of a Receiver and before he takes possession, is not an interference with the Court that appointed the Receiver.

And the Court of Appeals in its opinion, in considering that case, was compelled to distinguish between "actual possession" by the Receiver and his "right to possession." (fol. 74.) The logical conclusion, therefore, would be that in this case at Bar the Receiver could not be held to have had actual possession. But it is actual possession which has always been the criterion.

In *Bowery Savings Bank* vs. *Richards*, 3 Hun, 366, the proceedings were founded upon alleged contempt. There was a Receiver of rents and profits in a foreclosure suit. Prior to the foreclosure suit, the owner of the equity of redemption had assigned the rents to three persons who were not parties to the foreclosure suit. After notice of the Receiver's appointment, one of these persons collected rents and refused to pay them to the Receiver. *Held*, that as the tenant never undertook to pay the Receiver the rent, or attorned to him in any way, the Receiver, although duly appointed, was *not in possession* of the rents, and therefore the assignee of the rents was not guilty of *contempt of Court* in collecting and withholding the rents (pp. 368, 369).

The essential difference between the mere right to take possession conferred by the order for appointment of the Receiver, and his actual possession is well marked by the successive decisions of the Court of Appeals in the cases of *Walling* vs. *Miller*, *108 N. Y., 173*, and *Varnum* vs. *Hart*, *119 N. Y., 101, 108.*

In the first case a sheriff had levied execution, but (as in *Wiswall* vs. *Simpson*, 14 How., U. S., 52), had not taken possession; a Receiver subsequently appointed took possession and while he was in possession the sheriff sold, and the sale was held absolutely void. In the subsequent case of *Varnum* vs. *Hart*, the sheriff not only levied but took and retained possession, and sold after the appointment of a Receiver; his sale was held not void but at most irregular, and *Walling* vs. *Miller*, was distinguished on the ground of the sheriff's actual possession.

So, an execution issued after the appointment of a Receiver in supplementary proceedings, and levied upon property not in his possession is valid.

Smith *vs.* Davis, 63 Hun, 100.

## Sixth Point.

**There are manifest reasons for distinguishing the present case from the authorities relied on by the Courts below and the defendants in error to sustain their action.**

1. All those cases are cases of conflicts of jurisdiction between Courts whose jurisdiction was *concurrent.*

But it is otherwise here. The jurisdiction of the Court of Admiralty is exclusive, not concurrent with the State Courts.

The Hine, 4 Wall., 568.

2. The Receiver could come into the Admiralty Court, as, in fact, he has come in, and every right which he has is there secured to him and can be enforced. If the libellants in that Court were not entitled to the maritime liens which they claimed to enforce, then, according to the laws of the United States, he could establish that they were not so entitled and defeat them. If they were entitled to them he could secure to himself all that he was entitled to of the property after them.

There was, therefore, not the slightest reason for his endeavor, by the extraordinary process of enjoining the libellants from proceeding in the admiralty suits, to take the matter before another tribunal.

3. The State Court has no power to enforce the claims which the libellants are seeking to enforce. Those claims are maritime and cognizable in the admiralty alone.

It is true that the Court of Appeals closed its opinion by saying: "Our decision here does not affect the legal rights of the libellants in the vessels in question. The Receiver will be obliged in this proceeding to distribute the proceeds arising from a sale of the property among the creditors of the corporation, as their priority of rights may appear and be held valid."

But it is manifest that in so saying the learned Court overlooked not only decisions of this Court but also its own decisions, that the Courts of the State have no power to enforce in that proceeding the rights which the libellants claim.

This was decided nearly at the same time by this Court in the case of The Belfast (7 Wall., 624), which followed the case of The Hine (4 Wall., 555), and by the N. Y. Court of Appeals in the case of The Josephine (39 N. Y., 19).

"It must be taken, therefore, as the settled law of this Court, that wherever the District Courts of the United States have original cognizance of ad-

miralty causes, by virtue of the Act of 1789, that cognizance is exclusive, and no other Court, State or National, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

4 Wall., 568.

"Authority does not exist in the State Courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien" (7 Wall., 645).

"The exclusive cognizance conferred upon the District Courts of the United States excludes all jurisdiction from the State Courts, except such concurrent remedy as is given by the common law (39 N. Y., p. 27).

In the recent case of Brown *vs.* Gray (70 Hun, 263), the Supreme Court of N. Y., at General Term, recognized this fact of its inability to enforce maritime liens. It said: "The case at bar is an equitable action brought in the first instance to enforce a maritime lien, and by an amendment to the complaint it is sought to adjudicate as to the existence of the maritime liens claimed and if found to exist to determine their amount. This, under the decisions, we think, cannot be done."

The decisions cited were:

The Hine, 4 Wall., 555.
The Belfast, 7 *Id.*, 625.
The B. F. Woolsey, 3 F. R., 457.

4. This proceeding of an injunction is utterly ineffective to any good purpose. The Receiver had not the possession of the property and the marshal had possession of it. The injunction preventing the libellants in the admiralty from proceeding had not the slightest effect to give that possession to the Receiver. If this Court should decline to reverse the judgment the Receiver would be no better off. He must still go to the United States Court, whose officer the marshal is, and take some

proceeding to obtain that possession by some order of that Court; and the injunction of the Supreme Court forbidding these plaintiffs in error from "*taking any further proceedings*" in those actions could not be held to enjoin them from resisting a proceeding in those actions, which was taken by the Receiver.

The only effect of the injunction thus far has been to lock up the proceedings in those actions and the property seized by the marshal from Dec. 7, 1891, till now.

A reversal of this judgment will break the lock and progress can then be made towards a determination of the controversy. In no other way can it be done.

## Seventh Point.

**This proceeding of the corporation under which this Receiver claims was collusive, and is not entitled to be regarded as valid as against the plaintiffs in error.**

Mr. Moran's affidavit at fol. 40 shows that he had had business dealings with this corporation for some years, and that in July, 1891, becoming suspicious as to what the corporation intended to do, he went to Vosburgh, its manager, and told him his suspicions. Vosburgh thereupon told him that "they were not doing anything, and if they did anything, he *would let me know in time to protect myself.*" And Moran says, that, relying on these representations, he refrained from filing libels against the boats.

If this statement is true (and it is not denied), manifestly the whole proceeding of obtaining a receivership was in bad faith, as against these plaintiffs in error. And the Receiver, who represents

the corporation, should not be allowed to set up any claim which should prevent the plaintiffs in error from enforcing the rights, whose enforcement they were led to postpone by these representations of the manager of the corporation.

A similar case was the case of the slaver Reindeer (2 Wall., 402). That vessel arriving in Providence, R. I., was seized by a Sheriff of the State under a warrant of attachment against her owners, who were non-residents.

While the vessel was so in custody of the Sheriff a warrant was issued to the United States Marshal against her in a proceeding to forfeit her for being engaged in the slave trade, and under that warrant the marshal seized her. The doctrine of Taylor *vs.* Carryl was appealed to by her owners, who insisted that as the vessel was in the custody of the State Sheriff, under his writ of attachment from the State Court, the marshal could not rightfully seize her under his warrant, and the District Court had no jurisdiction.

But this Court refused to give any effect to the writ of the State Court, saying:

"1. Undoubtedly it was decided by this Court in the case of Taylor *et al. vs* Carryl (20 Howard, 583), that where a vessel had been seized under a process of foreign attachment issuing from a State Court, the marshal, under process from the admiralty, issued from the District Court of the United States, in a libel for seamen's wages, could not take the property out of the custody of the Sheriff; but in that case the Sheriff had the prior and exclusive possession of the property.

The undisputed facts, however, in this case are otherwise. Immediately on the arrival of the vessel at Newport, the Collector placed a custom house officer on board of her, and that officer was in the actual possession of the vessel and cargo when the attachment was made. Both vessel and cargo were then in the custody of the United States, and so, in fact, remained until the same

were sold by the marshal by the order of the Circuit Court. By order of the District Attorney, the Collector, some days before the libel was filed, made a formal seizure of the vessel for a violation of the slave-trade acts; and at that time the revenue officer who had taken possession of the vessel before she was attached, still had her in custody, and he remained in possession of her until the sale, when the proceeds were paid into the registry of the Court. Under these circumstances it is clear, we think, that the case of Taylor *et al. vs.* Carryl does not apply, and that the seizure was rightfully made.

2. Our conclusion also is, from the evidence, that the suit of the appellants was a collusive one; and upon that ground, also, we are inclined to hold that the objection of the appellants must be overruled. Having come to that conclusion, it is unnecessary to examine the third answer presented by the United States to this objection."

That case would seem to be abundant precedent for a holding by this Court, that it will not allow this claim of a constructive possession, so tainted with bad faith, to be more powerful than the actual possession of the U. S. Marshal, the benefit of which the plaintiffs are equitably entitled to have.

## ~~Seventh~~ Eighth Point.

**The judgment of the State Court should therefore be reversed, and a judgment directed denying the prayer of the Receiver's petition with costs.**

CARPENTER & MOSHER,
Attorneys for Plaintiffs in Error.

ROBERT D. BENEDICT,
JAMES EMERSON CARPENTER,
JOSEPH F. MOSHER,
Of Counsel.

# Supreme Court of the [illegible]

No. [illegible]

MICHAEL MORAN, PETER CAHILL, CHARLES and JARVIS MASTERS,

*Plaintiffs in Error,*

vs.

FRANK D. STURGES, as Receiver of [illegible] TOWBOAT COMPANY,

*Defendant in Error.*

*In Error to the Supreme Court of the State of [illegible]*

## SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

[illegible]

[illegible]

[illegible] & HOMER,

*Attorneys for Plaintiffs in Error.*

# Supreme Court of the United States.

No. 892.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL and JARVIS MASTERS,
Plaintiffs in Error,

*vs.*

FRANK D. STURGES, as Receiver of Schuyler's Steam Towboat Company.

## Supplemental Brief for Plaintiffs in Error.

A re argument having been ordered by the Court in this case, we desire to present a few suggestions in addition to the brief which we filed on the prior argument.

### First.

We suggested in our former brief that the application of the Receiver, by petition to the Supreme Court of the State for an injunction against these

libellants, ought not to have been granted, because the same questions. which he sought to raise by his application, were already involved in the Admiralty cases, and had been raised there by his answer to the libel.

In opposition to this view it was urged that the principle, that a party might go to an Equity Court under certain circumstances, to prevent by the injunction of that Court the trial of an action at law, might be appealed to, to sustain the Receiver's application.

This principle has been the subject of discussion in a recent case before the Court of Appeals of the State of New York (Pond *vs.* Harwood, 139 N. Y., 111), and the Court used the following language (p. 117).

"There can be no doubt that the Supreme Court "may, in a proper case, perpetually stay the pro- "ceedings of the plaintiff in an equitable action at "the suit of his adversary in another equitable "action. Formerly the Court of Chancery denied "the existence of the jurisdiction, and said that "an application for such a stay could scarcely be "considered as seriously made" (Medlock *vs.* Cogburn, 1 Rich. Chy., 477; McReynolds *vs.* Harshaw, 2 Iredell Chy., 196).

"Although the power now concededly exists, it "cannot be arbitrarily asserted. The grant of a "temporary injunction is usually discretionary; "but not so with a decree allowing a perpetual "stay. Facts must be shown, which, according to "the established rules for the administration of "equity, will authorize that kind of relief. A "subsequent action cannot be maintained to re- "strain the prosecution of another action in the "same Court unless it clearly appears that full and

"complete justice cannot be obtained in the "earlier action (Hall] *vs.* Fisher, 1 Barb. Ch., 53; Hayward *vs.* Hood, 39 Hun, 596; Cowper *vs.* Theall, 40 *id.*, 520; Erie R. R. Co. *vs.* Ramsey, 45 N. Y., 637; Savage *vs.* Allen, 54 *id.*, 458; Wallack *vs.* Society, 67 *id.*, 23). As was said by Com. Reynolds, in Savage *vs.* Allen, *supra*: 'The prop- "osition that a separate action may, under our "present system, be maintained to restrain by in- "junction the proceedings in another suit in the "the same or another Court, between the same "parties, where the relief sought in the latter suit "may be obtained by a proper defense to the "former one, has long since been exploded, or, if "not, should be without delay.'"

It is plain that, in the present case, the very relief which the Receiver sought to obtain by his injunction proceeding could be obtained if he was entitled to it in the Admiralty suit. He had set up in the Admiralty suit as a defense that the Admiralty Court had not jurisdiction, because the possession of the property, which is the foundation of the jurisdiction in a proceeding *in rem* (Miller *vs.* The United States, 11 Wall., 294; The Anna F. Dorr, 4 Fed. Rep., 459), had not been obtained by the Court of Admiralty. Whether such was the case was the question he asked the Court of Admiralty by his answer to decide. His going to the State Court was only in order to have *that very question passed on by a different tribunal.*

And the idea of doing that is one which has been, or should be, exploded, as the Court of Appeals said.

## Second.

Nor is the attempt of the Receiver to be justi-

fied on any idea that, if he could succeed in removing the property out of the jurisdiction of the Admiralty into the State Court, he could thereby obtain a better remedy.

For we maintain that not only could the Receiver not obtain a better remedy, but he could not obtain so good a remedy, in the State Court.

(*a.*) The only object of the Receivership was to obtain a proper distribution of the property of the corporation among its creditors. It was only to that end that he sought to take possession of the property.

If the libellants in the Admiralty suits had been seeking to obtain an *undue* preference over other creditors, that would have been a reason for preventing any such action on their part, by an injunction from a Court of Equity restraining them. But there can be no such claim.

The libellants in the Admiralty were only seeking to enforce maritime liens which they claimed on these vessels. If they had such liens a Court of Equity could not and would not deprive them of them. If they did not have such liens, the Court of Admiralty would not enforce them. And the Court of Admiralty was of course the proper Court to determine whether such liens existed, and their amount.

On this ground, therefore, the relief which the Court of Equity could give could not be better than that which the Receiver could obtain in the Admiralty Court, nor so good.

(*b.*) If the Receiver could, by taking the property into his own custody and disposing of it as Receiver, realize a larger amount from the property for the benefit of the creditors, he would so far obtain a better remedy.

But it will hardly need argument to show, that a sale of this property, *subject to liens whose amount was not ascertained*, would be as unfavorable a sale as possible.

It follows, therefore, that unless the Receiver, by taking possession of this property, could have sold it, *free from these maritime liens*, such a sale must be the worst sale that could be made, and his resort to equity could have no basis of any hope of a better remedy.

(*c*) This presents the question whether the sale of these vessels by a Receiver of their owner's property, the Receiver being appointed under a law of the State of New York, would operate to cut off maritime liens on the vessels.

1. We have not been able to find any provision of the Laws of the State of New York which could be claimed to give such authority to such a sale; and we are very clear in the opinion that, if a State statute purported to give such an authority, it could not be held to be valid.

We have no reported case to support this view.

But the following case is within our personal knowledge.

The statutes of the State of New Jersey have the following provision:

"84. *Mortgaged property in litigation may be* "*sold free of liens.*

"Where the property of an insolvent corpora- "tion, in the hands of a Receiver or Receivers, or "trustee or trustees, appointed under the laws of "this State, *is encumbered with mortgages or other* "*liens, the legality of which is brought in ques-* "*tion, and the property is of a character ma-* "*terially to deteriorate in value pending the litiga-*

"*tion*, the Court of Chancery may order such Re-
"ceiver or Receivers, or trustee or trustees, to sell
"the same, clear of incumbrances, at public or
"private sale, for the best price that can be ob-
"tained, bringing the money into the Court of
"Chancery, there to remain subject to the same
"liens and equities of all parties in interest, as was
"the property before it was sold, and to be dis-
"posed of as the said Court, by its decree, shall
"order and direct."

The Act concerning corporations in the State of New Jersey, approved April 7, 1875, with all the amendments to January 1, 1887.

The New Jersey Lighterage Co., a New Jersey corporation, was put in insolvency and a Receiver was appointed of its property, part of which consisted of certain steamtugs and lighters which were subject to maritime liens. The Receiver, having obtained possession of the vessels, the parties who had the maritime liens applied to the Court for leave to prosecute those liens by proceeding in the Admiralty, and the Chancellor decided to authorize the parties to proceed in the Admiralty against the vessels while in the Receiver's possession, and such proceedings were taken and the vessels were sold by the Court of Admiralty, the Chancellor's order providing that the Receiver might intervene for the purpose of saving his rights to any surplus and remnants.

This ruling of the Chancellor seems to be fully sustained by the reason of the case.

(*d.*) How could the Supreme Court of the State, in distributing the property of this corporation among its creditors, give effect to the maritime liens, which these libellants had?

It might be, if the libellants appeared in the proceeding in the Supreme Court of the State, and submitted themselves to the jurisdiction of the Court and *asked* that Court to recognize and enforce the liens, that the Court would do so.

But that is by no means the question. The question is whether, if the libellants declined to appear in that proceeding and submit their liens to the jurisdiction of that Court, that Court *could compel them to do so.*

We think there can be no ground to claim that a State Court has that power.

By the Constitution of the United States, the Courts of the United States have *exclusive* jurisdiction of all Admiralty and maritime cases. And it will hardly be claimed that a proceeding *in rem* against a vessel, in behalf of one who claims a maritime lien on her, to enforce such maritime lien, is not an Admiralty case.

Nor can any color sustaining the jurisdiction of the State Court be found in the saving clause of the Ninth Section of the Judiciary Act (Rev. Stat., § 563), because that only saves "the right of a "common law remedy where the common law is "competent to give it." And it would be a contradiction in terms to say that a maritime lien is a common law remedy, or that it can be enforced by any proceeding of the common law.

Nor can a statutory proceeding to wind up a corporation be considered as a "common law remedy," and "it is not a remedy in the common law Courts which is saved, but a common law remedy."

The Moses Taylor, 4 Wall., 431.
The B. F. Woolsey, 3 Fed. Rep., 457.
Stewart *vs.* The Potomac Ferry Co., 12 *id.*, 301.

The jurisdiction of the Admiralty Courts, to enforce maritime liens, has always been held to be exclusive. This Court so expressly decided in the case of The Hine (4 Wall., 555), and followed it by the decision of the case of The Belfast (7 Wall., 645), in which it used the following language:

"Authority does not exist in the State Courts "to hear and determine a suit *in rem* in Admiralty "to enforce a maritime lien."

The libellants in the admiraly causes are entitled to have their causes passed on by the Court of Admiralty, according to the rules and practice of the Admiralty, and not by the Supreme Court of the State, according to the rules and practice of that Court. And that right could not be taken from them.

If the Supreme Court of the State of New York have no power to determine a suit to enforce a maritime lien it must follow that the libellants in these Admiralty suits could not be compelled to submit theis liens to the determination of that Court. Therefore, if the Receiver had taken possession of these vessels, a sale by him could not cut off the liens, and he would have had to sell the vessels *subject to the liens.*

(*e.*) A very interesting case on the question of the power of a State to authorize a sale of property which should cut off maritime liens is the case of The Elexena (53 F. R., 359).

The State of Virginia passed a statute to prevent the robbery of its oyster beds, in which statute it provided for the seizure and sale of vessels which violated the law, and provided that such sale "shall "vest in the purchaser a clear and absolute title to "the property sold."

After a sale of the Elexena in a proceeding under that statute, a libel was filed in the Admiralty to enforce a maritime lien on her previously existing, and the question was whether the sale under the statute had cut off the lien. Judge Hughes, in a learned opinion, held that the State had no power by a sale under the statute to destroy a maritime lien on the vessel.

(*f.*) If it be suggested that the libellants might, by some proceeding in the Admiralty, obtain a determination of the existence and amount of their liens, and might, thereupon, apply to the State Court to recognize that determination and give effect to it in its distribution of the property by the Receiver, for the benefit of the libellants, the answer is manifest. It would not be possible to obtain such a determination in the Admiralty, except by just the proceeding taken in this case, and by the seizure of the vessel by the officer of the Admiralty Court under the process of that Court. That Court could not have any jurisdiction to determine the lien unless the vessel was brought within its jurisdiction by such seizure.

Possession of the property is the essential foundation of an Admiralty proceeding *in rem*.

(*g.*) The situation, therefore, is this: The libellants' liens must be passed on by the Admiralty Court.

Possession of the vessel by seizure under the process of the Admiralty Court is an essential requisite to the power of the Admiralty Court to pass on those liens.

If there had been an actual taking possession of the vessels by the Receiver, so that by force of the

rule of Taylor *vs.* Carryl, and other cases, the Admiralty Court could not obtain such possession while such possession by the Receiver lasted, the result would be that, unless the State Court should allow the libellants to proceed against the vessels in Admiralty to enforce their liens, as the Chancellor of New Jersey did, the Admiralty proceeding would have to wait till such Receiver's possession ceased. Possession of the property could then be taken by the Admiralty Court, and the libellants' liens could then be passed upon.

As the Court said in the case of The E. L. Cain (45 F. R., 370): "For the present, this Court can proceed no farther. But the liens set up in this Court are maritime liens which *cannot be adjudicated or passed upon in the State Court.* Over these liens the jurisdiction of this Court is exclusive. *They will be protected in this Court.* Let the causes be retained until the State Court has ordered the sale, or in any other mode releases its custody of the tug."

(*h.*) If the Receiver had actually obtained possession of the vessels before the Marshal did, and if thereupon the libellants had applied to the Supreme Court for its permission to proceed against the vessels in the Admiralty while in the Receiver's possession, that Court, if it had any regard for the interests of all parties, must have given that permission, as the Chancellor of New Jersey did.

As Judge BROWN says, in the case of The James Roy (59 Fed. Rep., 786):

"As the sale of any property by the State Court, while the property is subject to an undefined, unadjudicated maritime lien, is highly disadvantageous and prejudicial to the assigned estate, leave to sue in a Court competent to make a binding adjudication

as regards such liens is usually given, though sometimes leave is refused apparently through misapprehension as to the lack of constitutional authority in the State Court to sell and convey the property free from the maritime lien, or to abridge the creditor's constitutional right to enforce his lien in the Federal Court. When such leave is refused the creditor, if he wishes to rely on his lien, must wait till the State Court has disposed of the property, and the creditor can then pursue his constitutional remedy *in rem* against the property, without regard to the proceeding in the State Court."

And it must surely be said that if the State Court ought to have permitted the libellants to take proceedings in the Admiralty after the Receiver had possession, it is most unreasonable that it should have undertaken to enjoin them merely because their proceedings were begun before the Receiver obtained possession.

## Third.

Furthermore, the action of the State Court in enjoining the libellants from "taking any "further proceedings in the actions in the "U. S. District Court," has already shown itself to be utterly nugatory. Instead of being a better remedy, it has proved to be no remedy at all.

For three years the libellants have been under such injunction. The Receiver has derived no benefit from it. He stands just where he did when the injunction was first issued. And if this Court affirms the judgment he will be in the same position still. The vessels, having been in the custody of the Marshal then, remain still in his possession, unless they have been sold as perishable.

The Receiver will then still be compelled to apply to the Court of Admiralty again.

If he applies on a motion he will have to face the previous decision of the Court that the question is one which should not be passed on by motion but by answer, especially as in accordance with that previous decision he filed an answer to raise that question.

If he applies on his answer, the Admiralty Court will have to pass on the question of jurisdiction. If it decides that it has no jurisdiction because of the *constructive* possession of the vessels by the Receiver, then if the vessels were still in the possession of the Marshal the Court would be in exactly in the position of the Court in the case of the E. L. Cain, above referred to; and it is not to be doubted that it would do as the Court did in that case, declare its intention to protect the maritime liens, and to proceed to enforce them as soon as the State Court released its custody.

If the vessels should have been sold as perishable, a new situation would present itself, in which the Court of Admiralty, having possession of a fund on which the libellants claim to have maritime liens, which it is the duty of the Admiralty Court to protect, whnld be asked to turn over that fund to the officers of a State Court, which Court has no power to enforce a maritime lien, in the idea that in some way the State Court would find some means to protect the maritime lien.

We cannot doubt that in that case the Admiralty Court would say as Judge Blatchford said, in the analogous case of The Sailor Prince and her freight money (1 Blatch., 239), after referring to the principle on which Taylor *vs.* Carryl was decided:

"But if the principle be extended so far as to

"permit the State Court, as against the seamen "in this case on the freight money of this vessel "for their wages, to appropriate that money to "the payment of the inferior claims of the cred- "itors who have attached it by the process of the "State Court, the lien of the seamen on such "money for their wages is gone, extinguished, put "out of existence, in the face of an Admiralty "Court, by the act of a Court of common law. The "Court of Admiralty is to abnegate functions "which are conferred upon it by the constitution "and laws, and to refuse to enforce a clearly ad- "mitted paramount Admiralty lien, which no other "Court can enforce or directly destroy or supersede, "because a State officer has, under process from a "State Court, attached a sum of money which is the "subject of such lien, and is to permit the State "Court to apply that money to the payment of an "inferior claim not founded on a lien, and thus in- "directly destroy the lien practically and to all "intents and purposes. I cannot believe that any "such doctrine flows from the decision in Taylor "*vs.* Carryl, or will be sustained by the Supreme "Court of the United States. So believing, I sus- "tain the jurisdiction of this Court in this case."

## Fourth.

The case is one in which no possible good can result to anyone from the affirmance of the judgment of the State Court.

Everyone must concede that, if these libellants have maritime liens upon these vessels, they are entitled to be paid the amount of those liens out of the vessels, and all that the Receiver is entitled to have for the other creditors is what remains after those maritime liens are paid.

Now there are involved in this case three questions:

The first question is whether the Supreme Court of the State has power to enjoin the libellants from proceeding with their causes?

Suppose this Court decides that it had not that power, and therefore reverses the judgment?

The Receiver will none the less get all that he is entitled to, and the libellants will be put in the shortest way to get what they are entitled to.

But if this Court decides that the Supreme Court of the State had power to enjoin the libellants, that will only bring before it a second question, which it must decide before it can affirm the judgment.

The second question is whether, granting that the Supreme Court of the State had the power to issue such injunction, the circumstances warranted its being issued.

It will at once appear that the only possible effect of the injunction was delay, and that, if the injunction had not been issued, the Receiver would long ago have obtained all he was entitled to, and the libellants would have obtained what they were entitled to and that this result will be now most speedily obtained by the reversal of the judgment and the dissolution of the injunction.

But, if this Court should also decide this second question in favor of the Receiver, nothing will be gained for him beyond a barren success on this appeal, unless this Court shall proceed to dispose of a third question.

The retaining of the injunction for three years has given to the Receiver no progress towards the settlement of the controversy and the realization of what he is entitled to.

And the continuing of the injunction by a decree of affirmance on this appeal will give him no step of progress towards that end. He will still be compelled to apply to the Admiralty Court to determine the question which he raised by his answers there, viz., whether that Court had obtained jurisdiction of the suits *in rem* by its seizure of the *res*.

The third question, which will arise after the determination of both the previous questions in favor of the Receiver, and without whose answer by this Court his success upon the two previous questions will be without fruit to him, is whether the Admiralty Court did obtain jurisdiction of the suits *in rem* by its seizure of the vessels?

Here, again, if this Court shall decide against the Receiver, he will still get all that he is entitled to.

If this Court shall decide that question also in the Receiver's favor and hold that the Admiralty Court did not obtain jurisdiction, nothing will be gained for the Receiver but a barren success as before.

If, on his application to the Admiralty Court, the vessels should be delivered to him, he could only sell them subject to the maritime liens, which would be the worst possible sale for him. It would produce the least possible amount for the other creditors besides the maritime lien holders, while it would further delay the maritime lien holders in enforcing their liens. Thus it would produce only disadvantage to all parties.

If, instead of the vessels in the custody of the Marshal, the Receiver should find only a fund in the Registry of the Admiralty Court, his application to that Court to pay over such fund to him would raise a series of new and strange questions. And, if it were paid over to the Receiver intact, to

be disposed of under the direction of the Supreme Court of the State of New York, the case would only present the following extraordinary and unpleasant dilemma: Either the liens of the maritime lien holders must be cut off and lost to them by a distribution of the fund without regard to them, or those liens must be left to the protection and enforcement of a Court which, as the repeated decisions of this Court have declared, has no jurisdiction to enforce a maritime lien.

To land the parties between the horns of such a dilemma as that would surely be a "vain and im-"potent conclusion."

On the contrary, to reverse the judgment of the State Court and to leave the cases to be determined in the appropriate jurisdiction of the Admiralty will most easily and simply settle the whole matter, and will be the shortest and best way to give to the libellants the rights to which they are entitled, while giving to the Receiver also all that he is entitled to have.

ROBERT D. BENEDICT,
JAMES E. CARPENTER,
Counsel for Appellants.

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JAMES H. McKENNE
Clerk

# Supreme Court of the United Stat

October Term, 1893.

MICHAEL MORAN *et al.*,
*Plaintiffs in Error,*

*against*

FRANK D. STURGES, as Receiver, &c. of SCHUYLER'S
TOWBOAT COMPANY,
*Defendants in Error.*

## BRIEF ON BEHALF OF LEHIGH VA
## COAL CO. and U. S. MARSHAL.

McCARTHY & BERIER,
*Advocates, &c.,*
50 Wall Street, New York.

# Supreme Court of the United States,

OCTOBER TERM, 1893.

MICHAEL MORAN *et al.*,
Plaintiffs in error,

*against*

FRANK D. STURGES, as Receiver, &c., of Schuyler's Steam Towboat Company,
Defendant in error.

## Argument on behalf of The Lehigh Valley Coal Company, and of Alexander Walker, U. S. Marshal.

On the 31st day of July, 1891, a large number of libels had been filed in the District Court of the United States for the Eastern District of New York, to assert general maritime liens.

Process had issued, pursuant to those libels, and a number of steam-going vessels had been seized by the United States Marshal.

Before these vessels were seized, they had been found in the possession of a corporation named The Schuyler Towing Company.

Afterwards, to wit, on or about the 11th day of November, 1891, the Supreme Court of the State of New York, on the solicitation of its officer, Frank

D. Sturges, Esq., proceeded to, and actually did, inhibit all proceedings in the Federal Court under the aforesaid libels, and enjoined the prosecution of all of them.

Previously Mr. Sturges, acting as aforesaid, had filed a petition in the Federal Court for the delivery to the State Court of the vessels which had been attached.

This petition was denied. Thereafter, he petitioned the Supreme Court of the United States that it prohibit the District Court, sitting in admiralty, from entertaining the aforesaid libels. This petition was also denied.

On the 28th day of May, 1892, these vessels were sold by order of the Federal Court. No other steps have been taken by that tribunal, since the order of injunction was made by the State Court.

The seamen have remained unpaid for a period of nearly two years and a half since their services were rendered.

Supplymen are also unpaid.

The Marshal, who expended nearly $10,000 in the custody of these vessels and in preserving them from harm, all of which was done in the strict discharge of his duty, is thus far, and to this extent, a creditor.

A day or two prior to the time when the Marshal seized these vessels, their nominal owner, The Schuyler Towing Company, had petitioned the Supreme Court of the State of New York that the company be declared insolvent, and that a temporary Receiver be appointed of its property.

This petition was granted on the same day, and Frank D. Sturges, Esq., was appointed Receiver.

These things were done, that is to say, a few

hours before the Marshal laid hold of these vessels, alleged to be subjects of maritime liens.

It was not until the 4th of August, some two days after the arrest on the part of the Marshal, that Mr. Sturges qualified as Receiver, and gave the bond required by law.

When, therefore, he went in quest of these vessels, he found them in the hands of the Admiralty Court.

This argument is made in behalf of the Lehigh Valley Coal Company, one of the libellants aforesaid, and of Walker, the Marshal of the Court.

We shall endeavor to maintain the following propositions:

I.—The Admiralty Court had jurisdiction to seize these vessels, and afterwards to sell them. Purchasers at this sale took an unimpeachable title.

*Per contra*, the State Court acquired no dominion over them.

II.—The State Court had no power to enjoin proceedings pending in a Federal Court.

III.—When a Federal officer, acting under authority of process, lays hold on property, the lawfulness of his conduct can be disputed nowhere else than in the Federal tribunal.

IV.—The order of the State Court was nugatory as well as improvident, and unlawful. While it has restrained all proceedings in the Federal Court for a period of nearly three years, it has not advanced the claim of the Receiver in the slightest degree.

The actors in the Federal Court have suffered much, while the Receiver has gained nothing.

Although the Receiver appeared in the Admiralty Court, and, by answer, excepted to its jurisdiction, the State Court has prohibited the trial of the issue thus presented.

Conceding now, *arguendo*, that there is a weighty conflict in respect of jurisdiction between the Courts, this order of injunction makes it impossible, so far, to put an end to it.

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*First.*—There is no question, here, of priority of possession. The State Court never got hold of the vessels that were subject to maritime liens.

At the time of their arrest by the United States Marshal, they were in the possession of their nominal owner, The Towing Company.

Possession is a fact and not an inference, and there can be no reasonable claim on the ground of "constructive possession."

It is absurd to urge that the Federal Court was in actual, while the State Court was in constructive, possession.

The position taken by the State Court through its Receiver, we assume to be as follows:

(1.) When a petition for the insolvency of The Towing Company was presented to the State Court, it thereby acquired jurisdiction over the subject in controversy.

This is true.

(2.) When that Court made an order appointing a temporary Receiver of this corporation, it thereby sequestered the property of the corporation, to the use of all concerned.

This proposition, also, is true.

(3.) This order of sequestration was an exercise of dominion over all property of the corporation, and bestowed the right of immediate possession on that Court and, by anticipation, made void any subsequent seizure.

In other words, *the right to possession* conferred by the order of sequestration, superseded *the fact of possession*, no matter whether it existed in an individual, or in a Court of co-ordinate power.

This proposition contains the kernel of the controversy.

We strenuously deny it. Our contention, briefly, is this:

The order of appointment conferred on the Receiver such property, only, as the insolvent corporation had title to, at the time the order was made.

No third person, much less a Court of co-ordinate power, was thereby divested of actual possession, maintained under a hostile title, or, indeed, under any claim to which the debtor's title would have been subordinate.

Hills *vs.* Parker, 111 Mass. R., 508.
Noe *vs.* Gibson, 7 Paige R., 515.
Chicago Bank *vs.* Kansas City Bank, 136 U. S. R., 236.

The Special Term of the Supreme Court says (fol. 53):

"When said libels were in fact filed, the title of the property in question was in the Receiver, as an officer of the Court, * * * but in this case (fol. 56), by the order of the Supreme Court the title at once vested in the Receiver before its seizure by the Marshal."

What title? we ask. Certainly not a general, indefeasible, title; but, as above remarked, such title, only, as the insolvent debtor had.

Says the Supreme Court (136th U. S. R., 236):

"The utmost effect of his appointment is to put the property from that time into his custody, as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property."

The position taken by the State Court, is this: An alleged *right to possession*, supersedes *possession in fact.*

This is only true as between the Court and any person under its jurisdiction, where there is no dispute of title.

But it is not true, even against a person, in a case where the latter claims adversely to the insolvent debtor.

Thus, the holder of an overdue chattel mortgage, who shall have taken possession after the appointment of a Receiver, cannot be divested of possession at the suit of the Receiver.

Leadbetter *vs.* Leadbetter, 125th N. Y., 290.
Judson *vs.* Easton, 58th N. Y., 664.
Kimball *vs.* T. & M. Nat. Bank, 138th N. Y., 504.
Champlin *vs.* Johnson, 39th Barb., 608.

Much less can he be summarily disposed of, on motion.

Still more, between Courts of co-ordinate power, the right to, will not be allowed to supersede the fact of, possession, even though the latter arose *ex delicto.*

Gumble *vs.* Pitkin, 124th U. S. R., 156.

Otherwise the decisions in Hogan *vs.* Lucas, 10th Peters; Taylor *vs.* Carryl, 20th How.; Buck *vs.* Colbath, 3rd Wall., 334; Freeman *vs.* Howe, 24th How., 450; Covell *vs.* Heyman, 111th U. S., 176, mean nothing.

All these cases hold that possession, in a Court of general jurisdiction, cannot be disturbed by a foreign tribunal, although asserting a paramount right.

The even and consistent administration of justice

demands, that the Court, which is first in possession, shall pass upon the question of title.

Taylor *vs.* Carryl, the leading case, distinctly holds that a paramount lien, itself not cognizable in a State Court, must yield to the prior custody of a Court which is asserting a subordinate right.

In Peck *vs.* Jenness, 7th How. U. S. R., 624–5, the Court says:

"Where a Court has jurisdiction it has a right to decide every question which occurs in a cause; and its decision, whether correct or otherwise, is regarded as binding in every Court. Where the jurisdiction of a Court, and the right of plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested by proceedings in another Court."

"Neither can the one take the property from the custody of the other by replevin or any other process."

In Slocum *vs.* Mayberry, 2d Wheat., 2, the Court says:

"Any intervention of a State authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would, unquestionably, be a violation of the act; and the Federal Court, having cognizance of the seizure, might enforce a re-delivery of the thing.

The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the Court having cognizance of the cause."

In Freeman *vs.* Howe, 24 How., 455, it is said:

"According to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of property under its process."

In Buck *vs.* Colbath, 3rd Wall., 334, the Court says:

"Whenever property has been seized by an officer of the Court,

by virtue of its process, the property is to be considered as in the custody of the Court and under its control for the time being; and that no other Court has a right to interfere with that possession, unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, or some superior jurisdiction in the premises."

The State Court is wrong, therefore, in asserting that the right to possession supersedes the fact, and enables it, summarily—that is to say, through its own process—to lay hold on the thing which it claims the right to possess.

Beyond any doubt, our objection is sound, when a foreign tribunal is in possession, under an adverse claim.

"When a marshal upon a writ of attachment in mesne process, takes property of a person not named in the writ, the property is in his official custody, and under the control of the Court whose officer he is, and whose writ he is executing; and, according to the decisions of this Court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way, except in the Court from which the writ issued."

Lammon *vs.* Fenser, 111th U. S. R., 19.

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But what foundation is there for the alleged title of the Receiver?

The Court of the State assumed too much when it declared:

"That the title to these vessels at once vested in the Receiver, before its seizure by the Marshal."

The Receiver took nothing that the insolvent corporation had not possessed.

There is no ground for asserting title in Mr. Sturges, except his *ex parte* affidavit.

This does not afford sufficient justification for the extraordinary pretension of the State Court, that

the prosecution of forty, or more, libels, in a Court of exclusive jurisdiction, must cease.

The Receiver may have erred on the matter of fact.

Therefore, the true procedure would have been for him to present his plea to the only Court competent to hear it—to wit, the Court in possession—and there to have declared, and proved by lawful testimony, that he, alone, had title and right to possession.

Otherwise, how could the Admiralty Court have presumed that Mr. Sturges was the owner of these vessels, at the time libels were filed against them?

In a word, the question of title, and a right to possession, could only be tested in the Court which had custody of the property.

This would be true, although such custody were wrongful.

Gumble *vs.* Pitkin, 124th U. S. R., 156.
Gelpecke *vs.* Milwaukee R. Co., 11th Wis., 451.
Parker *vs.* Browning, 8th Paige, 388.
Cassilear *vs.* Simmons, 8th Paige, 273.
Macomber *vs.* Merrihew, 40th Mich., 721.
Levi *vs.* Currick, 13th Iowa, 344.
Connolly *vs.* Deere, 11th Lea., 274.
Gardner *vs.* Smith, 29th Barb., 39.

Moreover, the meagre affidavits submitted to the State Court, tend to show that the insolvent corporation had no title to the vessels in controversy, when the order was made which appointed a Receiver.

The Holland Trust Company, as the holder of an overdue chattel mortgage, was then titular owner, and entitled to the right of possession (fol. 47).

The existence of this chattel mortgage was

acknowledged by the State Court (fol. 59), which, however, held it to be unimportant, seeing that the Receiver had, at least, an equity of redemption of the property.

But it is very clear that the owner of an equity of redemption cannot maintain replevin, or even trover, against one in possession.

Gardner *vs.* Smith, 29th Barb., 68.
Hull *vs.* Carnley, 11th N. Y., 502.
Champlin *vs.* Johnson, 39th Barb., 608.

Neither would he have any standing as a claimant in an Admiralty Court.

The cases cited by the State Court; to wit, West *vs.* Carey, 47 N. Y., 423, and Porter *vs.* Parmlee, 52 N. Y., 188, do not support its position, that its Receiver, holding a mere equity of redemption, was thereby vested with title and ownership.

At the very lowest, therefore, on the affidavits submitted to the State Court, conceding to it power to decide, there was a disputed question of title.

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It has been assumed, thus far, that the Receiver acquired the insolvent debtor's title on the very day of his appointment.

Perhaps this is too broad a concession; because, Section 66 of the Revised Statutes of New York provides that a Receiver "before entering on the duties of his appointment shall give such security to the People of the State, and in such penalty as the Court shall direct." * * Section 67 reads: "Such Receiver shall be vested with all the estate, real and personal, of such corporation, from the time of his having filed the security hereinbefore required." (See Bliss' N. Y. Code, vol. 2, sec. 2429, Notes.)

Now, if this question were one of priority of possession, the Receiver, under this statute, could not claim investment until he had given the security, to do his duty, required by law.

This is the obvious meaning of the words quoted.

The Receiver did not give such security, until after the Marshal had been in possession of these vessels for two days.

How can it be said then, that the Receiver had a prior right?

The answer, undoubtedly, to our argument will be this: The Receiver, indeed, was not vested until the 4th day of August, 1891, when he filed his bond; but, the Court appointing him was vested by the act of appointment, itself, which occurred four days before, and the investment of the Receiver "relates back" to that of the Court. We object:

(1) This construction contradicts, directly, the statute itself.

(2) It distinguishes between the Receiver, the servant, only, of the Court, and the power which appointed him.

It treats the investment of the one as something different to that of the other, and occurring at a different time.

We say, on the contrary, that the Court was invested at the time the Receiver was invested, and not before.

Herring *vs. N. Y. R. R. Co., 105th N. Y.*, 380.

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If it be true that the holder of an overdue chattel-mortgage cannot be divested of possession of a mortgaged chattel, although he took it after an order

of sequestration, it is equally clear that a Federal Court holding property pursuant to a libel, which asserts a maritime lien, cannot be divested of possession, although acquired subsequently to the order appointing a Receiver.

A maritime lien is certainly not inferior in dignity, to the lien of a chattel-mortgage. The former is *jus in rem*, and valid universally; while the latter is *jus in re*, and valid only against the debtor, or his representatives.

Now, the possession of an Admiralty Court, pursuant to a libel which propounds a maritime lien, is the possession of the lienor himself. Why should possession, under a maritime lien, be ousted, if possession under a mere mortgage-lien (both being subsequent to the order of sequestration), be respected?

The Bold Buccleigh, 7 L. C., 267, 284.
The Rock Island Bridge, 6 Wall., 213, 218.

In other words, why should an Admiralty Court, asserting a paramount lien, be treated with less consideration than an individual setting up for himself a claim *in personam?*

All these maritime liens arose, and were mature, long before the State Court made its order of sequestration.

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Finally, these vessels were sold by the Admiralty Court on the 28th day of May, 1892.

Is there any doubt that the purchasers at this sale got a good title?

Suppose there is a doubt, how is it to be settled?

Will the State Court, on an *ex parte* affidavit of its officer, order the purchasers, aforesaid, to surrender the property to its Receiver?

This is hardly credible; such a step would be unprecedented.

Yet, if the Receiver had the right to possession, he still has it; and, if he can maintain this alleged right by summary motion to enjoin all proceedings in the Federal Tribunal, he need not hesitate to demand that the purchasers surrender forthwith.

One of these motions is as improvident, and unlawful, as the other.

It is clear then, we submit, than an alleged right to possession, has no precedence over possession in fact.

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An apparent exception to the principle, contended for, is presented when two different Receivers have been appointed, in different proceedings, over the same funds.

Both cannot act, and title to assets is exclusively in one of them.

In these circumstances, it has been held that the Receiver who was appointed in the case which was first launched, takes title to the exclusion of his rival.

Gaylord *vs.* Fort Wayne R. Co., 6th Biss., 286.
Union Trust Co. *vs.* Rockford R. Co., *Ib.*, 197.

But this exception is only apparent.

These cases rest on the assumption that the controversies before the two Courts concern the same subject, that the parties are the same, and that the same remedies are to be applied.

Therefore, it was held that the Court first acquired jurisdiction which first summoned the parties.

In the case first cited, the Court says :

"Of course, in all that has been said, it is assumed what was the fact in this case, that the bill was not only filed first in this Court, but that the process was issued and duly served upon the parties, and that they were in Court subject to its jurisdiction before any proceeding was instituted in the State Court."

In the present conflict, the controversies are not over the same subject.

The parties in interest are not the same, and the jurisdictions are not concurrent. Each jurisdiction is exclusive of the other.

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The fact that admiralty jurisdiction is exclusive, and that it gives a judgment which State Courts have no power to give, makes this case a peculiar one, and essentially different to those reported in books on Receiverships and Injunctions. None like it are cited in either of the opinions of the State Court, or in the ample argument of the Receiver.

Thus, none of the lienors, who have been enjoined from proceeding in the Maritime Court, are creditors of the insolvent corporation.

They are not *inter partes;* nor are they within the scope of the authority assumed by the State Court. They are creditors of the vessels.

Since the State Court has no jurisdiction to recognize, or enforce, maritime liens at all, or to give one lien preference over another, or to declare some, or any, void for laches or other reasons, it certainly could not recognize these lienors if they were to appear before it, nor marshal their claims in due order.

Moreover, the property proceeded against, in the

Maritime Court, is not the same as that which the State Court could have laid hold on.

Here, the whole ownership is involved; there, only the special ownership of a person.

Suppose, now, these vessels had all been transferred to the State Court, on the ground that the order of sequestration was an act of dominion over them: What would have happened?

If the maritime lienors had appeared, in the State Court, they could have asked for nothing else, *pro interesse suo*, than a re-transfer of the vessels to the Federal authority.

By no other means could their liens have been maintained.

It can hardly be deemed necessary, however, for the Federal Court, being in actual possession, to pursue a needless formality like this.

*It would be a sufficient excuse in order to maintain possession that, otherwise, justice would fail.*

Suppose, however, that the State Court, being in possession, should refuse to re-transfer to a competent tribunal, at the request of privileged lienors?

It would then, accordingly, proceed to marshal the debtor's assets, and to sell the vessels, already encumbered by these privileges.

But the Admiralty Court would immediately reseize them, although in the hands of third persons, and sell them again to satisfy maritime liens.

In other words, the sale in the State Court would have given no title, and its proceedings would have had no validity.

This futile result would, besides, have been reached after great delay and great expense.

The Court of Appeals says (fol. 74):

"Our decision here does not affect the legal rights of the libellants in the vessels in question."

It certainly does affect them, because it either indefinitely postpones their adjustment, as above indicated (whereas the institution of Admiralty Courts was to give speedy justice to seamen and supply-men), or it compels these lienors to surrender their privilege, and take what they can get out of *hotch-pot*.

The seamen who were on board these vessels are still unpaid, after the lapse of two years and a half since their services were given.

It would seem that their "legal rights" have already been "affected."

The Court further says:

> "The Receiver would be obliged in this proceeding to distribute the proceeds arising from the sale of the property among the creditors of the corporation, as their priority of rights may appear and be held valid."

So the statute itself reads.

> Sec. 79, Par. I, Laws of 1880, quoted under Sec. 2429, Bliss (N. Y.) Code.

But, as we before urged, there will be no sale of the property in question; rather, only a sale of the limited ownership, therein, of the insolvent debtor, and these lienors are not creditors of the corporation, who have any claims to make against it.

No case, we submit, heretofore decided, where merely concurrent remedies were involved, throws any light upon the matter now in dispute.

Privileged lienors could not submit their claims to the jurisdiction of the State Court, unless they surrendered their privileges and accepted payment, *pro rata*, with general creditors.

These considerations, of course, would not prevail if the property already lay in the custody of a foreign Court.

Maritime lienors would then have to suspend proceedings, or obtain its leave, to begin them in a jurisdictional Court, or wait till the State Court had sold the debtor's interest in the vessels, and then seize them just as if nothing had transpired.

Undoubtedly, such is the meaning of Taylor *vs.* Carryl, and similar decisions.

But they all declare that comity, and the desire to avoid "unseemly interference," dictate the rule which they observe. Here is no reason for such forebearance, for the Federal Court is already in possession under a paramount right.

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We submit the following illustration as one that will give point to the preceding argument:

Thus; a bottomry bondholder is, incontestably, a creditor of the ship bonded, and not of its owner.

The debt due him draws maritime interest, and it perishes, if the vessel herself is lost, before the law-day.

It inheres in the thing the moment the credit is given, and becomes mature the moment the debt is due.

It creates a lien enforceable only in an admiralty Court.

It is paramount to almost any other demand.

Suppose, now, that one of these vessels had been thus bonded, that the marine debt had fallen due the day after Mr. Sturges was appointed Receiver; that, thereupon, the bondholder had become libellant in the District Court of the United States, and that the vessel had been seized by, and was in the custody of, the Marshal before the Receiver had

filed his bond. It is incredible, in these circumstances, that a State Court should claim to dispossess the officer of the Federal Court.

A State Court would be powerless to entertain the bondholder's claim.

At the very outset, it would have to declare that he was no creditor of the insolvent debtor, but was entirely beyond the scope of the State Statutes.

Now, the claims of seamen, and of material men, are in no wise different to that of the bondholder.

As to them, indeed, the principle is less obvious, because they had a choice of remedies.

But this does not affect the ultimate question.

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An argument whose motive is solely inconvenience, and hardship, is not likely to prevail.

Nevertheless, these are weighty considerations, always, and ought to be heard.

In the present case the seamen, and the material men, say that they chose to pursue their remedies in a Court which was able to give them speedy, and cheap, justice.

Their proceedings began nearly three years ago, and would have terminated, within a month, had they not been interfered with.

Their claims could have been paid, and a considerable surplus left for the Receiver "*to distribute amongst general creditors.*"

If the order of injunction is right the vessels may be turned over to the State Court; a permanent Receiver will follow on the heels of this temporary one, the business of the insolvent corporation may be continued indefinitely, new maritime liens will arise which will have a preference over

those now pending—in a word, none of these claims will ever be paid.

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*Second.*—The State Court had no power to make this injunction order. This position is sound, although it be conceded that the State Court had acquired dominion over this property.

The Admiralty Court was asserting an exclusive jurisdiction at the time when proceedings pending before it were enjoined, and this fact gives additional weight to our proposition.

The principle, heretofore maintained, seems to be that Federal Courts will not enjoin proceedings pending in the State tribunals; neither will the latter enjoin proceedings, pending in the former.

If there are exceptions to this rule, they are presented by decisions of the Federal tribunals, and rest on peculiar facts.

French *vs.* Hay, 22d Wall., 250.
Dietzch *vs.* Huiderkoper, 103d U. S., 494.

State Courts have seldom attempted to enjoin proceedings already brought, and actually pending in the Federal forum, and then, only, in cases of concurrent jurisdictions.

Indeed, it is believed that no injunction to restrain proceedings in a Federal Court, over which it had exclusive jurisdiction, has ever been given by a State Court.

To permit such an intervention, is to nullify the maritime jurisdiction of the United States District Courts; for the distinction attempted to be made between enjoining the Court, and forbidding litigants to proceed in it, is a shadow.

Peck *vs.* Jeuness, 7th How., 625.

The Courts of the State of New York have frequently refused to exercise this power, even when jurisdictions were concurrent.

Mead *vs.* Merritt, 2d Paige, 402.
Schuyler *vs.* Pelissier, 3d Edw. Ch., 191.
Custer *vs.* Griswold, 4th Edw. Ch., 364.

Those cited *contra*, such as Attorney General *vs.* Ins. Co., 77th N. Y., 272; Barry *vs.* Brune, 71st N. Y., 261; and Vail *vs.* Knapp, 49 Barb., 308, do not support such a pretension.

Dinsmore *vs.* Neresheimer, 32d Hun, 206, does maintain the right to enjoin proceedings in a Federal tribunal in a case of concurrent jurisdictions; but this decision is not authoritative, and the opinion, therein, is clearly erroneous.

On the other hand, the Supreme Court of the United States has uniformly held that State authority could not enjoin proceedings in the Federal forum, basing its decision always on the principle that the Courts are independent, each in its own sphere, and that to grant adverse injunctions would lead to interminable confusion, if not open conflict. One case only need be cited.

Riggs *vs.* Johnson, 6th Wall., 196.

If the Supreme Court of the United States, after having gone the length it did in Taylor *vs.* Carryl, to avoid "interference and conflict," should suffer an order like this to go unrepealed, it would be a marvel.

Consider the facts: The Receiver first applied to the District Court of the United States for the transfer of these vessels to the State authority. His motion was denied because it was of a too summary character; but leave was given him to plead to the jurisdiction, which he did.

The issue, thus presented, could have been

promptly tried but for this order of injunction.

Then he applied to the Supreme Court of the United States for a writ of prohibition to the District Court, which motion was also denied.

The Court, subsequently giving its reasons for this decision, said:

"We were petitioned to issue a writ of prohibition to forbid the District Court of the United States for the Eastern District of New York, sitting as a Court of Admiralty, from further proceeding in certain causes in which it had entertained libels against certain vessels, *in rem*, and had attached the vessels, Sturges claiming title to them, as a Receiver appointed by a State Court of New York, by a prior title, and having set up such title, in answers to the libels, and alleged want of jurisdiction in the District Court over the vessels.

This Court denied the application for the writ without delivering any opinion, but the ground of the denial was, that the matter was in course of litigation in the District Court, on due process."

(*In re* Fassett, 142 U. S. R., 484.)

Then the Receiver applied to the State Court, and obtained this injunction.

*In other words, the Special Term of the Supreme Court of the State of New York granted the writ of prohibition, which the Supreme Court of the United States had already refused.*

It is hardly to be doubted that such a step is contrary to all precedent.

It is an objection, although perhaps a narrow one, that the statute of the State of New York confers no authority upon its Courts to issue an order like this.

Section 2423 of the New York Code says:

"If such Receiver be appointed, the Court may, in its discretion, grant an injunction restraining the creditors of the corporation from bringing any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced."

These libellants are not creditors of this corporation. No affidavit of the Receiver, nor any decision of the State Court, can make them such. They are not within the provisions of the New York Code which embrace this subject.

This point has already been urged, and is again submitted, in order to show how wide is the distinction between this case and any that are cited on the Receiver's brief, because of the fact, that the Admiralty Court is applying a peculiar as well as an exclusive remedy.

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On this point the case of Dehon *vs.* Foster, 4th Allen, 543, and many like it, are often quoted. Construing a statute of its own State, the Supreme Court of Massachusetts declared that it had power to restrain citizens of that State from prosecuting actions in a foreign Court against another citizen, who was under the protection of its insolvent law.

This authority has often been questioned, and seems contrary to the principle asserted in Warner *vs.* Jaffray, 96 N. Y., 257, and Green *vs.* Van Boskirk, 5th Wall., 307.

It prohibits domestic, from taking actions which are permissible to foreign creditors, and, thereby, does them injustice ; but it makes a distinction in respect of paramount liens (7th Allen, 57).

It does not touch the question which is involved here ; to wit, that a State Court has no authority to enjoin proceedings in a Federal Court, when the latter is asserting an exclusive jurisdiction.

Moreover, the libellants represented on this brief, are not citizens of the State of New York, and not within the jurisdiction of its Courts.

See Mead *vs.* Merritt, 2d Paige, 402;
Burgess *vs.* Smith, 2d Barb. Ch., 276.;
Diggs *vs.* Wolcott, 4th Cranch, 179;
McKee *vs.* Voorhees, 7th Cranch, 279;
Williams *vs.* Ayrault, 31st Barb., 364;
Carroll *vs.* Farmer's Bank, Harring (Mich.).

*Third.*—That the injunction herein was nugatory, need not be argued. It has benefited no one, although it has postponed action for nearly three years The status of the United States Marshal, for whom, also, this brief is filed, is one of peculiar hardship.

In the first place, (these vessels, being in his custody,) he has been obliged to take care of them, and he has expended nearly $10,000 in doing so.

In the second place, he was bound to obey the order of the District Court to sell them. But if the order of injunction was valid, it is probable that it embraced the Marshal as well as the libellants.

A person occupying an official position so responsible as that of a United States Marshal ought to feel, that he can obey the orders of the Court, which appointed him, with impunity.

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Our assignment of error, herein, is, that the order of the State Court was void.

Respectfully submitted,

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# Supreme Court of the United States.

No. 892.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL AND JARVIS MASTERS,

*against* *Plaintiffs in Error,*

FRANK D. STURGES, AS RECEIVER OF SCHUYLER'S STEAM TOW-BOAT COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of New York.

## BRIEF AND POINTS FOR DEFENDANT IN ERROR.

JAMES W. EATON,
*Attorney for Frank D. Sturges, Receiver, Defendant in Error.*

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*against*

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## BRIEF AND POINTS FOR DEFENDANT IN ERROR.

### STATEMENT.

Schuyler's Steam Tow-boat Company was a corporation organized under and by virtue of the laws of the State of New York, and was engaged in the business of towing boats, mainly upon the Hudson river in said State. (Fol. 36.)

On July 31, 1891, an application was made by the trustees of this corporation for its voluntary dissolution and for the appointment of a temporary receiver, pending such dissolution, under the provisions of section 2423 of the Code of Civil Procedure of the State of New York. (Fols. 36–40.) On the same day, at a Special Term of the Supreme Court of the State of New York, held in the city of Albany, an order to show cause why said corporation should not be dissolved was granted on said petition, upon notice to the Attorney-General, as the representative of the creditors, and upon his due appearance and consent thereto, appointing Frank D. Sturges, of the city of New York, temporary receiver of the corporation. (Fols. 33–36.) This order was entered on the morning of the following day at 11.15, and served on the Attorney-General, as representative of the creditors, at 11.45 A. M. of that day (fol. 29), but the receiver's bond was not filed until August 4, 1891, at nine o'clock in the morning. (Fols. 18, 29.)

On the 1st day of August, 1891, subsequent to the entry and service of the order aforesaid, and, also, on August 3, 1891, certain libels were filed in the United States District Court of the Eastern District of New York, on behalf of the plaintiffs in error, on certain boats belonging to the company's fleet. (Fols. 18, 19).

Subsequently, defendant in error, as such receiver, obtained from the State court, at Special Term, an order to show cause why the libellants, who were in the jurisdiction of the State court, should not be restrained from proceeding under their libels. (Fols. 14-17). Upon the hearing on the return of this order, the prayer of the petitioner, said receiver and defendant in error, was granted (fols. 49–53) on the ground that by the order appointing a receiver *ipso facto* the State court had acquired exclusive jurisdiction over the subject in controversy, and the subsequent levy of the marshal was not of effect to oust such jurisdiction. (Fols. 52–60).

An appeal was taken from this order to the General Term of the Supreme Court, which affirmed the said order without opinion. (Fols. 61–63). Subsequently, an appeal was taken to the Court of Appeals (fol. 63), which, also, unanimously affirmed the order of the lower court (fols. 64–66), Peckham, J., writing the opinion. (Fols. 68–75.)

It now comes to this court upon a writ of error to the Supreme Court of the State of New York (fols. 1–3), and the sole question for the determination of this court is the question which has been decided in favor of defendant in error in the three successive State courts through which the controversy has passed.

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## POINTS.

### I.

BY THE ORDER OF JULY THIRTY-FIRST, APPOINTING A RECEIVER, THE NEW YORK STATE COURT ACQUIRED JURISDICTION OF THE PROPERTY OF THE CORPORATION, AND THAT JURISDICTION IS EXCLUSIVE AS AGAINST ALL OTHER COURTS OF CO-ORDINATE JURISDICTION.

This proposition is fully established by the decision of the Court of Appeals in this case; but, prior to that decision, the point was decided in favor of our contention so far as the conflicting jurisdiction of courts of the same State was concerned by the Christian Jensen Case (128 N. Y., 550), which is directly in point. The

proceeding was similar to the proceeding heretofore taken in the case at bar, and the case is conclusive upon the proposition that the jurisdiction of the court appointing the receiver attaches from the moment of filing the order, and the process of other courts, levied intermediate the filing of the order appointing the receiver and the filing of his bond, is void. There are, indeed, a large number of cases holding that while it may be necessary for the receiver to file security in order to give him power to administer the assets of the corporation, the act of filing security is not at all essential to the jurisdiction of the court, and process levied intermediate the appointment of the receiver and his giving a bond is void. (See Maynard v. Bond, 67 Mo., 315; Rutter v. Tallis, 5 Sandf. N. Y. Super Ct., 610; Steele v. Sturges, 5 Abb. Prac., 442; Texas R. R. v. Lewis, 44 Albany Law Jour., 180; Olney v. Tanner, 19 N. B. R., 178, 180; Sedgwick v. Menck, 1 id., 675; Atlas Bank v. Nahant Bank, 23 Pick., 480; Wiswall v. Sampson, 14 How., 52.)

And this rule has been repeatedly applied to cases where such an exercise of jurisdiction on the part of the State court has been held to give it exclusive cognizance and control to the exclusion of a Federal court of co-ordinate jurisdiction attempting to interfere with the subject-matter in dispute; and that, too, by the Federal courts themselves. (See Union Trust Co. v. Rockford, etc., R. R. Co., 6 Biss., 197; Wiswall v. Sampson, 14 How., 52; Holladay Case, 29 Fed. Reporter, 226; Bruce v. R. R. Co., 19 id., 342; Conkling v. Butler, 4 Bliss, 22; Hamilton v. Chateau, 2 McC., 509; Hutchinson v. Green, Id., 471; 6 Fed. Rep.; Walker v. Flint, 7 Fed. Rep., 485; Kennedy v. R. R. Co., 3 id., 97; The Red Wing, 14 Fed. Rep., 869.)

In Manvel v. North American Bridge Co. (N. Y. Law Jour., Dec. 12, 1890), a proceeding similar to that in the case at bar, O'Brien, J., says: "The court having first obtained possession of the property, this possession must be held to be *exclusive*, and no Federal court has jurisdiction to interfere with it. (Taylor v. Carryl, 20 How. [U. S.], 583.)"

The principle is elementary and is sustained by a long line of authorities.

In Judd v. Bankers and Merchants' Telegraph Company (31 Fed. Rep., 183), an action in which the complainant, a creditor of an insolvent corporation, sought to have the Federal court take

possession and distribute the assets of the corporation already in the hands of a receiver under the State court, it was said by Judge Wallace: "The case is one for the application of the rule that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation to the *exclusion* of all *interference* by other courts of co-ordinate jurisdiction. (Citing Taylor v. Carryl, *supra*; Williams v. Benedict, 8 How., 111; Hagan v. Lucas, 10 Pet., 400; Buck v. Colbath, 3 Wall., 334; Heidritter v. Elizabeth Co., 112 U. S., 294; Schuehle v. Reiman, 86 N. Y., 270; Union Trust Co. v. Rockford R. R. Co., 6 Biss., 197; Sedgwick v. Menck, 6 Blatchf, 156; Young v. Montgomery, 2 Woods, 606. And see also the very recent case of Porter v. Sabin, decided in this court in May, 1893.)

The case of Heidritter v. Elizabeth Co. (*supra*) is instructive in this connection. There property was seized by a United States officer for an infringement of Federal law. While thus in custody of the United States District Court it was seized under the State court to enforce a mechanic's lien. Both proceedings were *in rem*. The United States Supreme Court held that the Federal court had taken possession of the property and that the possession was necessarily exclusive. "The *res* was thereby drawn into the exclusive jurisdiction and dominion of the United States, and, for the purposes of that suit, it was at the same time withdrawn from the jurisdiction of the courts of New Jersey. Any proceeding against it involving the control and disposition of it in the latter, while in that condition, was as if it were a proceeding against property in another State. It was vain, nugatory and void, and, as against the proceedings and judgment of the District Court of the United States and those claiming under them, was without effect."

This doctrine was also asserted in the strongest terms by Judge Wallace in the recent case of Central National Bank v. Hazard (49 Fed. Rep., 293, citing Covell v. Heyman, 111 U. S., 183; Fox v. R. R., 2 Abb [U. S.], 157, and R. R. v. Gomila, 132 U. S., 478.) (See, also, Attleborough Bank v. Northwestern Co., 28 Fed. Rep., 113.)

In Morrison v. Menhaden Co. (37 Hun, 522), in which certain vessels had been seized by a marshal upon libels filed to enforce maritime demands, Daniels, J., says: "This custody of the prop-

erty of the defendant prevented its seizure under the execution of the applicant. It was wholly within the jurisdiction and authority of the United States District Court and was not the subject of seizure and levy under his execution." (Citing Freeman v. Howe, 24 How., 451; The Lottawanna, 20 Wall., 201; Covell v. Heyman, 111 U. S., 176.)

In Gluck on Receivers, section 32, it is said: "When the jurisdiction of the State court is not questioned, its prior cognizance of the controversy and possession of the property by its receiver cannot be interfered with by a Federal court." (See cases cited in note 4, p. 74.)

The principle is generally acknowledged that property in possession of an officer of a State court, under legal process is in the possession of that court, and, therefore, within its exclusive jurisdiction; and the Federal courts, by replevin or any other process, cannot disturb such possession. (Senior v. Pierce, 31 Fed. Rep., 625, cases cited; Kressel v. The E. L. Cam., 45 id., 367, cases cited; Teft v. Sternberg, 40 id., 2, cases cited.)

It may be argued that these cases do not apply to the case at bar, because here the property was not taken into manual possession under process of the court. But that, under the authorities, is not necessary. The rule is stated in Gluck on Receivers, section 31, as follows: "The rule stated that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res* * * * to the exclusion of all interference from other courts of co-ordinate jurisdiction, applies to State and Federal courts as well as to the several courts of a State. The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy if tangible and susceptible of seizure; for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained." (Citing Union Trust Co. v. Rockford R. R., 6 Biss., 197.) Such seems to be the general doctrine of the cases. (Heidritter v. Eliz. Co., *supra*; Beach on Receivers, §§ 20, 349; Gluck, § 30.)

Indeed, it will be found, upon examination, that all the cases which hold priority of manual possession as the test of jurisdiction between Federal and State courts are cases relating to the levy of a marshal on the one hand and the levy of a sheriff on the other, and do not apply to the case of a receiver. In those cases the liens are co-ordinate and equal, and the tribunal first acquiring actual possession, through its officers, gains complete control of the *res*. That is the only way that the court can gain control under its execution. The sheriff or marshal is not the hand of the court, as is the receiver, but only its officer to execute its mandate by seizing the property in behalf of an individual suitor. But, by the appointment of a receiver, the court in the exercise of its equity powers assumes the custody of the property to be disposed of for the benefit of all concerned, and such an act is the assertion of its highest prerogative and does not require any actual seizure to make it effectual. That this distinction is clearly recognized is shown by a great number of cases which hold that even where the sheriff or marshal has made an actual seizure the subsequent appointment of a receiver, by the court, prevents any sale under the levy, because the order appointing the receiver vests the custody of the property immediately in the court, without the necessity of manual possession. (See case cited *ante* and *post*, and particularly Union Trust Co. v. Railroad Co., 6 Biss., 197; Texas Trunk R. R. Co. v. Lewis, 44 Alb. Law Jour., 180; Matter of Berry, 26 Barb. 55.) The last mentioned case is particularly instructive in this connection. There a levy of property made by the sheriff before the appointment of the receiver, but after the making of an order directing his appointment, was held void. The court will take into account fractions of a day in determining priority of jurisdiction. (Matter of Berry, *supra*; People v. Bank, 53 Barb., 412, 417.)

If the rule were otherwise than has been above stated, the receiver of a corporation, the property of which was scattered over a large area, would be practically powerless, and the object of his appointment absolutely frustrated. The learned counsel for plaintiffs in error, in his contention for the doctrine that manual possession is essential to establish jurisdiction, relies wholly on the cases relating to the conflicting claims of sheriffs and marshals which, as above pointed out, bears no analogy to the case of a

receiver and a marshal. It is undoubtedly true that an execution in the hands of a sheriff binds personal property of a judgment-debtor from the time that it is lodged in the sheriff's hands, but this doctrine is only true so far as subsequent purchasers are concerned and has no application to the case where process is issued out of two co-ordinate courts, and the reasoning of the learned counsel as to the analogy between such process and the order appointing a receiver is therefore fallacious.

Apply this principle, above stated, to the case of courts of co-ordinate, but conflicting jurisdiction, and it follows that the court appointing the receiver has priority over the court subsequently levying, through its officer, upon the property which, by the act of appointing the receiver, is in the custody of the first court. The question of what title, if any, is taken by the receiver to the property is immaterial. The real question is that of the custody of the court through its receiver and during the continuance of the receivership. The above rule applies to most of the cases where manual possession has been held to be important. (See Hagan v. Lewis, 10 Peters, 401; Taylor v. Carryl, 20 How., 583; Freeman v. Howe, 24 id., 450; Buck v. Coldbath, 3 Wall, 334; Covell v. Heyman, 111 U. S., 176; Heidritter v. Elizabeth, etc., Co., 112 U. S., 284; Pullian v. Osborne, 17 How., 471; Adler v. Roth, 5 Fed. Rep., 895; Senior v. Pierce, 31 id., 626; The Sale of Prince, 1 Benedict, 237; The Carveim, 1 Lowell, 173; Loving v. Marsh, 2 Clifford, 323.)

The only conclusion warranted by the authorities is that the New York Supreme Court, by the appointment of its receiver, gained complete and exclusive jurisdiction of the property and that the Federal court had no right to interfere.

## II.

### A COURT SHOULD NOT ALLOW ANY INTERFERENCE WITH PROPERTY IN THE HANDS OF ITS RECEIVER.

Property in possession of a receiver is *in custodia legis*, and the court which thus has possession will not permit either courts or individuals to molest the receiver without its previous consent. It makes no difference that the court thus seeking to disturb its possession is a Federal court. (Gluck on Rec., §§ 30, 31, 32 and

cases cited; Judd v. Bankers and Merchants' Tel. Co, 31 Fed. R., 183; Beach on Receivers, § 15; Young v. Montgomery Co., 2 Woods, 606.)

It may be argued that the proceedings in the Admirality Court being *in rem*, and of a peculiar nature, take precedence of the proceedings in the State court. This point came before the Supreme Court of the United States in the case of Taylor v. Carryl, reported in 20 Howard, page 583. In that case it was held, after a careful consideration of the decisions that proceedings *in rem.* stand on precisely the same footing as those *in personam*, and that no court is authorized to interfere with the possession, custody or control of another court, no matter what the form of its mandate may be. (See, also, Jennings v. Carson, 4 Cranch, 2; Teft v. Sternberg, 40 Fed. Rep., 2; The Ship "Robert Fulton," 1 Paine, C. C., 620; Keating v. Spink, 3 Ohio R. [N. S.], 105; The Oliver Jordan, 2 Curtis, 414.) The latter case was one in which a vessel was attached by a sheriff under process of the Supreme Court of Maine. She was subsequently libeled in the District Court of the United States upon the claim of a material man. The District Court sustained its jurisdiction, but on appeal its decree was reversed and it was held that the vessel being in the custody of the law of the State the marshal of the District Court could not lawfully execute the warrant of arrest.

Parties having liens by reason of the nature of their claims can have such preferences secured in the receivership proceeding. This is only a temporary receiver who cannot distribute the assets. It will be the duty of the permanent receiver to apply the proceeds of the property in his hands among the creditors of the corporation as their priorities may be determined. (Krippendorf v. Hyde, 110 U. S., 276; Gumbel v. Pitken, 124 id., 131; Judd v. Telegraph Co., *supra;* Tefft v. Sternberg, *supra;* Young v. Montgomery Co, 2 Woods, 606.) In Judd v. Telegraph Company, Judge Wallace said, under circumstances similar to the case at bar: "If the complainant's interests have not been properly protected in the proceedings in the State court, he has an ample remedy as a party in interest in the proceedings there, upon sufficient cause shown, to obtain redress by intervening in his own behalf."

See, also, opinions of O'Brien, J., in Manvel Case, New York Law Journal, December 12, 1890, and January 17, 1891, respectively. Those were cases where the claimants sought to procure from the State court which had possession of the property, a modification of its injunction of suits, so that they might enforce their claims against the boats in admiralty. The court said: "Whatever may be the rights of the petitioners by virtue of their liens can be established and will be respected by the court, and in a way so as not to injure or destroy the rights of the other creditors. * * * If any question arises in reference to the amount of their claims the same should be determined, and, therefore, the petitioner be allowed to apply for payment of their claims when, if it shall be determined that they are entitled to a preference, an order can be made to that effect." See opinion of Peckham J., in New York Court of Appeals in case at bar.

It follows from the above propositions that the filling of the libels upon boats in the possession of the receiver was involving the receiver in vexatious litigation.

It was said in Carron Iron Company v. McLaren (5 House of Lords Cases, 416): "Where, therefore, pending a litigation here in which complete relief may be had, a party to a suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party." * * * The libellants were not warranted in subjecting the property to the costs of multiplied litigation.

## III.

### A COURT SHOULD PROTECT ITS OWN JURISDICTION AND PREVENT INTERFERENCE WITH ITS POSSESSION OF THE PROPERTY BY INJUNCTION.

It is said in High on Injunctions (vol. 1, § 108): "The courts have usually confined themselves in the granting of injunctions against proceedings in other tribunals, State or Federal, to cases where such *relief was necessary to protect prior jurisdiction of the courts first acquiring control of the parties and of the subject-matter.*"

It is said (Id., § 3): "The better doctrine, however, undoubtedly is that the State courts may, *for the purpose of protecting their jurisdiction*, when it has first attached over the controversy, enjoin

parties who are amenable to their process and subject to their jurisdiction, from afterwards litigating the subject in the Federal courts." (Citing Ackerly v. Vilas, 15 Wis., 401; Home Ins. Co. v. Howell, 9 C. E. Green, 238; see, also, Vermont and Canada R. R. v. Ver. Cent. R. R., 46 Vt., 792; Hendee v. R. R., 23 Blatchf., 453; Beach on Rec., §§ 738, 739, and see, to same effect, 1 Kent, 410.)

Again, at page 92, it is said: "When a State court has first acquired jurisdiction of the subject-matter, and of the parties, it may enjoin the prosecution of a subsequent suit by the defendant concerning the same subject-matter in a Federal court in another State."

There is no reason for any different rule in this respect in cases where the State court has acquired prior jurisdiction of the subject-matter in protecting that jurisdiction from interference by parties proceeding in the Federal court from that which prevails when the Federal court has acquired prior jurisdiction over the subject-matter in which such jurisdiction has been repeatedly maintained against parties proceeding in the State court. (See cases, *supra*, 1 High on Injunctions, § 110; French v. Hay, 22 Wall., 250; Dietzch v. Huidekoper, 103 U. S., 494; Baltimore and Ohio R. R. v. Ford, 35 Fed. Rep., 170.) In Christian Jansen Case (*supra*) Judge Earl said: "The court had power to prevent any interference with it *in any action*, and its dissipation and removal by a writ of replevin and attachment." How can interference in any action be prevented but by some order like the one granted?

It would be giving a right without a remedy to give a court *exclusive jurisdiction* of the *res* without giving it, at the same time, a means of preventing interference with that jurisdiction. (Ver. and Canada R. R. v. Ver. R. R., 46 Vt., 792.)

But, aside from the fact that the New York Supreme Court is entitled to the custody of the *res*, without interference from any other tribunal, and supposing, for the purpose of argument, that that court had not acquired jurisdiction of the subject-matter, we would yet consider ourselves entitled to the relief granted.

It is well settled, both in England and generally in this country, that courts of equity will restrain litigation in courts of other States, or even of foreign countries where such interference is justified under any of the heads of equitable jurisdiction. (High on Rec., vol. 1, §§ 103–107; 2 Story's Eq. Jur., § 899, *et seq*; Carron,

etc., v. McLaren, 5 H. L. Cases, 416; Dehon v. Foster, 4 Allen, 545; Bank of B. Falls v. Rutland, 28 Vt., 470; Hays v. Ward, 4 Johns. Ch., 123; Vail v. Knapp, 49 Barb., 299.) This interference is authorized by the jurisdiction of the court over the *parties* to the foreign litigation. The court acts "*in personam* upon these parties and directs them by injunction to proceed no farther in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court; but, *without regard to the situation of the subject-matter* of the dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*." (Story Eq. Jur., § 899.)

While there is some little conflict in the cases regarding this doctrine, the rule as stated above is supported by the clear weight of authority. (1 High, § 106 and note; Cunningham v. Butler, 142 Mass., 47; see, also, the learned note to this case, 56 Am. Rep., 663; also in 23 Cent. L. J., 274.)

In New York, while there was considerable opposition to the rule in some of the earlier cases, there is an unbroken current of decisions in which the courts have granted this remedy. (Mitchell v. Bunch, 2 Pai., 606; Hays v. Ward, 4 Johns. Ch., 123; Vail v. Knapp, 49 Barb., 299; Kittle v. Kittle, 8 Daly, 72; Erie R. R. v. Ramsey, 45 N. Y., 637, 648–49.)

In Vail v. Knapp (*supra*), the court say: "While as a general rule, the propriety of which is apparent, the courts of this State decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the courts of a sister State, yet there are exceptions to this rule; and when a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud.

"No rule of comity forbids it. * * * In granting the injunction we deal with parties residing in this State, and do not seek to interfere with or control the action of the court in Vermont in which the action is pending. We command our own citizens, not the courts or parties residing in Vermont."

In Dinsmore v. Neresheimer (32 Hun, 204), an action brought by a resident of New York, in the Supreme Court of the District

of Columbia, against an express company, to recover the value of property lost in transportation, was restrained because it was evident that the action was brought there to avoid the effect of the law as laid down by the New York Court of Appeals, and take advantage of that prevailing in the district, on the question of a carrier's right to limit his liability.

In that case Judge Daniels, after referring to the cases, states the rule: "The principle has been regarded and stated as elementary in its character; that a court of equity should interfere when sufficient equitable reasons are presented for doing so, to restrain the prosecution of any unconscionable action, although it may be pending in the courts of another State or country." The learned judge then goes on to state that the principle is equally applicable, whether the proceedings sought to be restrained be commenced before or after the domestic tribunal may have acquired jurisdiction over it.

He then cites from the leading English case (Carron Iron Co. v. McLaren, *supra*): "There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituing or prosecuting suits in foreign courts, *wherever the circumstances* of the case make *such an interposition necessary or expedient.* * * * Where, therefore, pending a litigation here in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a *vexatious harassing* of the opposite party and restrains the foreign proceedings."

The above case has been frequently cited with approval in the various courts of the State of New York. (Garrison v. Marie et al., Supreme Ct., 1 How. Pr. [N. S.] 348; Bowers v. Durant, 43 Hun, 348; affirmed, 104 N. Y., 651.) Its doctrine is the unquestioned law both in England and in all the jurisdictions of this country. The strongest argument which can be urged against it is that, if courts of one State should see fit to restrain proceedings in another, that other might retaliate in like manner by enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction. Even this reasoning loses its force when it is remembered that the injunction is not directed to the court of the foreign State, but simply to the parties litigant, the proceeding being purely *in personam*. (1 High on Rec., § 106, note; see, also, leading case of Dehon v. Foster, 4 Allen, 545.)

The cases which hold a different rule from that which is generally accepted are decided upon the argument above stated. (See cases, *supra*.) There seems to be no case, however, where a court has refused to restrain litigants in a court of another State or a Federal court from interfering with property within its own exclusive possession. (Carroll v. Bank, Harring [Mich.], 197; Williams v. Ayrault, 31 Barb., 564; Burgess v. Smith, 2 Barb. Chancery, 276; Willard Equity Jurisprudence, 348 and others.)

The New York Supreme Court, then, had power to grant the order, either on the ground of preventing irreparable damage to property or on the ground of preventing multiplicity of vexatious suits, or on the ground of preventing interference with property within its exclusive jurisdiction.

If, as we submit, it is necesary to obtain from the New York Supreme Court permission to file libels against the boat, and such permission can be properly denied, as in the Manvel cases cited (*supra*), certainly that court has power and should restrain further proceedings under libels which may have been filed where no such permission has been obtained, and as that court will restrain proceedings which may have been begun in the State court without permission. (See the Christian Jensen Case, *supra*; De Groot v. Jay, 30 Barb., 483; Taylor v. Baldwin, 4 Abb. Prac. Cases, 166.)

And, having jurisdiction over the parties, that court rightly restrained them from proceeding upon the libels in the present case. As said in the Vermont and Canada R. R. Co. v. Vermont. Central R. R. Co. (*supra*), a case where a Massachusetts court sought to interfere with property in the hands of a receiver, appointed by the court of Vermont, and in which the latter court promptly enjoined the foreign proceedings: "While the court is charged with the administration of this property, the servants and officers of the court called to aid in such administrtion *will* be protected while in the discharge of their duty; and when this court lacks the ability to afford such protection it should be deprived of the power to make any such appointment. And if, *having the ability, it refuses or neglects to exercise it, it fails in the performance of a plain and palpable duty.*" (46 Vermont, 792, page 801.)

The fact that the parties restrained claimed liens against the property, which might be enforceable in admiralty, gave them no

superior right to take the property out of the possession of the New York court in order to enforce those liens. (See Manvel Cases, *supra.*)

## IV.

THE WRIT OF ERROR SHOULD BE DISMISSED AND THE DEFENDANT IN ERROR RECEIVE SUCH RELIEF AS HE IS ENTITLED TO.

JAMES W. EATON,
*Attorney for Frank D. Sturges, Receiver,*
*Defendant in Error.*

# Supreme Court of the United States.

No. 892.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL AND JARVIS MASTERS,

*Plaintiffs in Error,*

*against*

FRANK D. STURGES, AS RECEIVER OF SCHUYLER'S STEAM TOW-BOAT COMPANY,

*Defendant in Error.*

**In Error to the Supreme Court of the State of New York.**

## Supplemental Brief and Points for Defendant in Error on Reargument.

JAMES W. EATON,

*Attorney for Frank D. Sturges, Receiver, Defendant in Error.*

## POINT I.

The principal argument in behalf of plaintiff in error, contained in Point I. of Mr. Benedict's brief, is that the injunction of a State Court is inoperative to control or affect parties proceeding in a Federal Court, and the main support rests upon the quotation from Story's Equity Jurisprudence on page 9.

It will be noticed upon inspection of Judge Story's work that the sections immediately preceding the quotation deal with the right of a Court of Equity to restrain persons within its jurisdiction from proceeding with vexatious or harassing litigation in other courts *irrespective of the question as to which Court has prior jurisdiction.* And what is meant by the passage quoted is that neither State or Federal Courts will interfere in proceedings in the other upon that ground alone. That this limitation is recognized by the learned commentator appears from what follows.

The citation continued is

> "This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective Courts being entirely competent to administer full relief *in the suits pending therein.*"

This assumes that the action in which the parties sought to be restrained *is already pending* in the other Court; that such Court has jurisdiction to proceed to a final adjudication, and to enforce its judgment for which reason the right to enjoin was denied. This appears in Mr. Benedict's second citation, U. S. vs. Keokuk, 6 Wall, 514, which is based upon Riggs vs. Johnson Co., 6 Wall, 166. The syllabus shows this clearly

> "The mandamus when so issued, being to be regarded as a writ necessary to the jurisdiction of the Court *which had previously attached,* and to enforce its judgment; and the State Court therefore not being to be regarded *as in prior possession of the case.*" See page 197.

See also pages 194 (citing 7 Cranch 281) 196 and 197; at 196 Clifford J. says

> "and the general rule is that as between Courts of concurrent jurisdiction *the Court that first obtains possession of the controversy,* or of the property in dispute must be allowed to dispose of it without interference and interruption from the co-ordinate Court."

See also page 197. On page 196 Clifford, J. also says: That the want of power in the State Court to control the proceedings of a Circuit Court is

> "not on account of any *paramount jurisdiction* in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of the State tribunals."

The case of Daly against the Sheriff, also cited by Mr. Benedict, page 9 of his brief, is to the same effect. The Sheriff had seized property under an execution and the Federal Court was asked to restrain the proceeding.

The remarks of Judge Nelson in Freeman vs. Howe 24 How 453 would seem to indicate an anomalous condition of affairs where two Courts were in controversy, namely that the State Court alone would have power to determine its jurisdiction, and the Federal Court alone the power to determine its jurisdiction. This again brings us back to the proposition acknowledged by all the Courts that that Court which has assumed jurisdiction in the first instance has the right to proceed to a determination of the controversy. The quotation from Story therefore is by no means as broad as it would seem. The Court of Appeals touched the root of the matter in holding that the Court which has first assumed jurisdiction has the right to proceed without interference. This must be so between State and Federal Courts, for otherwise if through the State Court its officers had physical possession of property it could afterwards be seized by the Federal Court and that Court could then insist upon disposing of the controversy.

It is very clear that if Judge Story's proposition meant anything else than what we claim, it is not supported by the weight of authority. Most of the cases cited by Mr. Benedict, on page

9 of his brief, in support of this proposition, with the exception of those already referred to, are cases which merely hold that one court cannot enjoin the execution or final process of another, which is conceded without any question. The case of Bryan v. Hixson, there cited, held that one court would not enjoin proceedings in another, except to enforce obedience to process already issued, *as against suitors already in court*. This, it clearly appears, is in favor of our contention. But, as pointed out in Point III. of my original brief on page 12, this court has in the case of French v. Hay, and in the other cases there cited, clearly held the right to enjoin parties from proceeding in the State Courts where the Federal Court has acquired prior jurisdiction, which must be regarded as the rule now governing in this court. In other words, we insist that we are supported by the Federal authorities in holding that one Court has the power to restrain parties in any other, where it has prior jurisdiction, for if the Federal Court has the right to restrain parties in the State Court, certainly the converse of the proposition is true.

And see on this point:

Sharon v. Terry, 36 Fed. Rep. 337.
Frishman v. Insurance Cos., 41 id. 449.
Sinclair v. Pierce, 50 id. 851.
Texas & P. Ry. v. Kuteman, 54 id. 547.
Abeel v. Culberson, 56 id. 329.
Central Trust Co. v. So. Atlantic &c. Co., 57 id. 3.

It is interesting to observe that in the case of Sharon v. Terry, Mr. Justice Field clearly and specifically lays down the doctrine which we contend for here, that the Court first obtaining possession of a controversy retains it to the end, and then proceeds to discuss the question of the effect of the judgment obtained in such a suit upon the subsequent suit in another Court. The prior cases are all collected in Mr. Justice Field's opinion. In Texas & P. Ry. v. Kuteman, the case of Fisk v. Railroad Co., 10 Blatch. 520, is referred to with approval, as it is also in Sharon v. Terry. In that case Judge Blatchford said:

> "The provision of Sec. 5 of the act of March 2, 1793, that a writ of injunction shall not be granted to stay proceed-

> ings in any Court of a State, has never been held to have, and cannot properly be construed to have, any application, *except to proceedings commenced in a State Court before the proceedings are commenced in the Federal Court;* otherwise, after suit brought in a Federal Court, a party defendant could, by resorting to a suit in a State Court, defeat in many ways the effective jurisdiction and action of the Federal Court after it had obtained full jurisdiction of person and subject-matter."

In Central Trust Company v. South Atlantic &c. Co., it was held that where a State Court had first appointed a receiver the Federal Court would not thereafter interfere by the appointment of a receiver, and a large number of cases are cited. If this doctrine be true, and I think it cannot be doubted in the face of the long line of decisions in the Federal Courts, certainly the Court whose jurisdiction first attaches must have some means of protecting that jurisdiction. How else can it protect the jurisdiction save by such an injunction as the one which is here sought to be sustained?

II.

The argument in Mr. Benedict's second point, that the pendency of the action in the District Court is a defence to this proceeding, is a complete *petitio principii*. As a matter of fact the first proceeding taken was in the State Court. The receiver went into the District Court merely because he was compelled to go there. His motion before the District Court was a motion which it was his duty to make, by reason of the summary character of the proceeding. But it was his duty, also, when he found he could not sustain his proceeding there, to go to the State Court which had appointed him. It was then the State Court which acted and not the receiver. The whole argument of appellant's counsel proceeds on the theory that the receiver acts like an ordinary party to a litigation. This is not true. He is the hand of the Court. The Court by taking the property and placing it in the hands of a receiver, takes constructive possession of it itself, and its exercise of its jurisdictional right through its receiver, is a high prerogative right which is entirely different

from any other proceeding. In the E. L. Cain case (45 Fed. Rep. 367-369) it is said on this subject that where a receiver is appointed, the property is in the custody of the law. (Citing Beach on Receivers, Sec. 221, and Covell v. Heyman, 111 U. S., 176.) The Court continuing (p. 369) says:

"No act of the receiver, no waiver of claim on his part, could change the *status* of the property, or affect the control of the Court. Even his refusal to accept the appointment or to act on the order, or his wilful abandonment of his duty, would not work such change or affect such control. (Beach, Rec. *Supra*). The receiver derives his whole authority from the Court, acts under its orders, has little or no discretion; none, indeed, not reviewable by and under the control of the Court. (See Thompson v. Insurance Co., 136 U. S., 287, 10 Sup. Ct. Rep. 1019.) As he took custody by order of the Court, he can release from custody only by its order; and if the property, being in the custody of the law, is placed in his keeping, his laches, even his abuse of his authority cannot take it out of such custody. Wherever, within the territory of the Court the property is, it is in the custody of the law. The presence of the officer is simply a form of notice of this. His absence does not destroy this custody." (a)

That is to say, even if the receiver did go into the Federal Court and begin proceedings there, that did not and could not divest the jurisdiction of the State Court (which, as we claim, was exclusive) from being asserted.

Certainly it will not be claimed that even if the receiver were an ordinary party he would be limited to one form of action. It is clearly stated in the case of Buck v. Colbath, on which appellant relies, that a party is not restrained by the fact that he has proceeded in one form of action from employing other means of relief. And in this case, it is repeated, the injunction issued was the injunction of the Court in the exercise of its jurisdictional power, and in pursuance of the right of the general injunction granted by it in the original order appointing the receiver. See fols. 34 and 35.

So in regard to the third point of appellant's counsel, all that

this Court has ever held in this case is that, as a matter of practice, the District Court is the judge of its own jurisdiction, and that was the reason it declined to grant the writ of prohibition. That is a proposition with which we have no quarrel. It is simply what we insist upon here, that the State Court which has prior cognizance of these proceedings, is the best judge of its own jurisdiction,

III.

It is contended in point four of Mr. Benedict's brief that there must be manual possession, and that constructive possession is not sufficient.

In Buck vs. Colbath, 3 Wall, 341, this subject is considered and Miller, Justice, says page 342,

> "It is only while the property is in possession of the Court, *either actually or constructively*, that the Court is bound or professes to protect that possession from the process of other Courts. Whenever the litigation is ended, or the possession of the officer or Court is discharged, other Courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

On page 343, he speaks of an *order of sequestration* in chancery as bringing the property before the Court for its action. If as we claim the appointment of the receiver sequestrates the property, it takes it from the owner and places it in the custody of the receiver, or takes it into its own custody: and if the receiver should not accept the appointment the order would not be at all affected. This idea of constructive possession in the Court is certainly that to which the Court in the Heidritter case refers when speaking of the exercise of a dominion equivilent to a possession.

The State Court has a right to interpret the State statute under which the proceedings were taken for the dissolution of the Company and under which the order appointing the receiver was made. The State Court has the right to say what the effect of each step of the proceedings may be and this construction of the State statute in regard to a state law will be

adopted by the Federal Court.

United States v. Morrison, 4 Peters, 124.
Green v. Neal, 6 Peters, 291.
Polks Lessee v. Wendel, 9 Cranch, 87.
Elmendorf v. Taylor, 10 Wheaton, 157.
Leffingwell v. Warren, 2 Blatch, 599.

Under the statute in question the State Court has declared that the title to the property of a corporation vests in the receiver *from the date of his appointment*, and that the property by the act of appointment is taken into the custody of the Court. Such is the effect of the provisions of the statute. A fair analogy may be drawn from the construction which has been placed by the Federal Court upon the provisions of the bankrupt act which is fully considered in the case of

*Vogel* 7 Blatch 19, by Justice Nelson.

Justice Blatchford in the District Court states in substance that the filing of the petition by the bankrupt shall be an act of bankruptcy and shall be deemed to be *the commencement* of proceedings in bankruptcy; that the assignment of the estate of the bankrupt *shall relate back to the commencement* of said proceedings in bankruptcy; and thereupon by operation of law the title shall vest in the assignee; that the assignee shall demand and receive the estate as signed or intended to be. The bankrupt filed his petition on October 5th; on the 6th he surrendered to the Register some of his property; on the 7th he was adjudged bankrupt; on the 6th creditors replevined property. Therefore the simple fact remained that a petition in bankruptcy had been filed and the Court says:

> "It is manifest, from these provisions, that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes, eo instanti, a bankrupt, so far as any interference with the property named in his inventory is concerned, *and that such property is thereby brought into the bankruptcy Court, and placed in its custody and under its protection, as fully as if actually brought into the visible presence of the Court.* Being in the custody of the bankruptcy Court, no other Court, and no person acting under any

process from any other Court, can, without the permission of the bankruptcy Court, interfere with it; and, to so interfere, is a contempt of the Bankruptcy Court."

And the judge cites Taylor vs. Carryl and the other cases, and speaks of the Bankruptcy Court as having lawful possession of the property. Judge Nelson affirms this decision.

The effect of this decision is to hold, as we contend, that there is no necessity for *physical* possession of the property in order that it be in the custody and under the control of the Court.

The learned counsel also cites a number of cases, already referred to in the brief for respondent, for the purpose of showing that priority of actual possession is necessary in order to give priority of jurisdiction. As pointed out in the original brief, these cases, including Hagan vs. Lucus, Taylor vs. Caryl, Freeman vs. Howe, and others, were all cases where the contest was between the lien of the execution of the sheriff on the one hand and of the marshal on the other. The reason why manual possession is necessary in such cases in order to give jurisdiction, and the distinction between such cases and the one at bar, has already been dwelt upon in respondent's brief, and need not be referred to here.

In answer to counsel's remark about "racing," on page 29 of this brief, I will say, that there may very well be a race of diligence to invoke the aid of the Court, but when that aid has been invoked, and the Court has acted, the race is at an end.

IV.

Under point five, counsel for Moran cite the case of Albany City Bank vs. Schermerhorn to disprove the proposition that the order of appointment vests the receiver with possession of the property. It is difficult to see why counsel rely upon this case, as such reliance proceeds from misapprehension of facts, and also a failure to distinguish between the question of the title of the Receiver and the *custody* of the Court, This case (which was reported first in Clark's Chancery, 297, and afterwards in 9 Paige 372, and also 10 Paige 263) was brought to charge the sheriff with contempt, for attempting to seize upon growing crops of defendant after the appointment of a receiver,

but before the attornment of defendant's tenants to him. The chancellor held the sheriff guilty of contempt. Afterwards on the first appeal, (9 Paige 372) the chancellor sent the case back for further proof. In the course of his opinion (page 377) the chancellor said, "so far as I can understand this case from the master's report, there is no question as to the equitable right of the receiver to all the personal property of Schermerhorn in which he had any interest at the time of the commencement of these suits, and to the rents, profits and income of real estate which accrued after that time; provided such property, or rents or income had not been reached by the execution of other creditors before this Court made an equitable sequestration thereof by its order for the appointment of a receiver. (Tanford vs. Weston 2 Sim and Stew. 96.)" The chancellor then proceeds to show that while the appointment of the receiver gives the Court jurisdiction to compel the delivery of the property to the receiver, and that while "this Court, upon proper bill filed, will protect his rights as against the trespasses of others who have seized upon the property, the question on which to proceed for contempt," however, depends upon the question whether the Receiver, either by himself, or his agents or tenants was in possession of the property at the time it was seized by the appellants and not upon the mere right of the plaintiffs to reach such property by a creditor's bill," hence the chancellor sent it back to determine, not whether the property was in the custody of the Court so that it could be reached by a bill in equity, for that was conceded, but to determine whether the receiver had a sufficient *title* to proceed against the sheriff for contempt. Afterwards when it came up again in 10 Paige it was shown that the appellants had really not been guilty of any continued interference with the possession of the receiver, and the chancellor therefore dismissed the proceedings. It would seem on an unbiased perusal of this case that it is in favor of the respondent, as the proceeding at bar is not in the nature of a proceeding for contempt but is really similar to a bill in equity to enforce the decree of a Court having jurisdiction,—a right which is clearly given in the Schermerhorn case. There seems to be a distinction

drawn in a later New York case, between the title of the receiver to personal property and to real property. The rule laid down by Comstock, J., in Chatauqua County Bank vs. Risley, (19 N. Y. 369-374) is as follows, "the personal estate becomes vested in the receiver from the time and by virtue of his appointment, the real estate only by virtue of a conveyance to him, which the Court has power to compel; and in this way satisfaction is worked out." In that case the conveyance of the real property to the receiver not having been made, the sale under a levy by the sheriff of such property was held valid, although it is intimated that the sheriff was guilty of contempt. But later New York cases have extended this doctrine. In the matter of the Attorney General vs. Atlantic Mutual Life Insurance Company (100 N. Y. 279) it is declared that upon the appointment of a receiver of a corporation he becomes vested with all the property of the corporation, real and personal, without any conveyance, and that is said to be the general rule in England and in this country. See Gluck on Receivers page 19, note 3. And it clearly appears from the decision of the Court of Appeals in this case, that so far as the Schemerhorn case holds any different principle, it must be considered to have been overruled, and is therefore of no authority, and as pointed out in Judge Peckham's opinion the proceeding for contempt bears no analogy to this proceeding, (fols. 73 and 74.) The same may be said of the case of Bowery Savings Bank vs. Richards, (3 Hun 366,) which was, like the Schermerhorn case. a proceeding for contempt, and which therefore has no application here and may be presumed to have been overruled. The case of Varnum vs. Hart 119 N. Y., 101-108 is incorrectly, or rather, incompletely stated by the learned counsel. If it is read carefully it will be clearly seen that the levy of the sheriff in that case was made *before* the appointment of the receiver, and it was therefore held that the sale on execution after the appointment was not absolutely void, but merely irregular. In the case at bar the seizure by the marshal was made after the appointment of the receiver, wherein lies the distinction.

**The case of Farmer's Bank vs. Beaston (7 G. & J. 421) which**

is also cited by the learned counsel is an anomalous one and certainly contrary to the current of authority. This case is severely criticized in Maynard vs. Bond (67 Missouri 315).

This seems to include all the important cases cited by counsel for Moran. In his argument the learned counsel fails to discriminate between constructive possession, which is all these cases required and actual possession, and lays too much stress upon the vesting of title in the Receiver. The question here, as pointed out, is not what title the Receiver could give to a purchaser, but whether the property in controversy is by the appointment of the receiver, in the custody of the Court. The truth is that temporary receivers are never properly vested with the full legal estate or title, but merely have the custody and possession as the hand of the Court. They cannot sell or convey property, as permanent receivers can, and it is therefore immaterial to enquire whether actual manual possession is necessary in order to give a receiver a title which he can convey.

The case of Smith vs. Davis, 63 Hun, p. 100, was a case involving property to which the receiver made no claim and had no right, and so is not applicable here.

V.

The sixth point of the learned counsel is based entirely upon a misapprehension of what is claimed. We do not for an instant insist that a State Court has the right to enforce proceedings in admiralty in the first instance, and that is all that the case cited by appellant's counsel hold. What we claim is that maritime liens attaching to the vessels cannot be affected by any proceedings in the State Courts, except so far as delay is concerned, and that, as I have before pointed out, is not an illegal delay because if the receiver had actually secured manual possession it would have been conceded to be correct.

This proposition as to the continued attachment of maritime liens, is all that is meant by the opinion of the Court of Appeals in this case, and is clearly supported by all the authorities. See Taylor v. Carryl; Buck v. Colbath, Freeman v. Howe, etc.

In the recent case of the James Roy (59 Fed. Rep., 784) the doctrine is laid down that property in the possession of a receiver

a. And see Ames v. Dunton cited page 7 ante



is *in custodia legis*, and that parties who have a maritime lien against such property must obtain the consent of the State Court appointing the receiver before proceeding to arrest in admiralty. This is the doctrine of the Manvil case cited in my original brief at page 11. This seems to be the unquestioned law. It rests upon reason as well as authority. Certainly if maritime liens continue to attach to the property in question, as is conceded, no injury can possibly be done to the holders of such liens beyond the possible delay in the satisfaction of their claims. On the other hand, as is pointed out in the petition of Mr. Sturges used on the original motion, and as is a matter of common knowledge, the forced sale of the property by the United States marshal is necessarily a sacrifice, and even the libellants will probably realize but a small portion of their claims. If, on the other hand, the boats were surrendered to the receiver and an opportunity given to the subsequently appointed permanent receiver to sell as a fleet and under favorable circumstances, not only will the libellants stand a better chance of having their claims liquidated, but the general non-maritime creditors, who under the present arrangement are very much in the cold, will stand some chance of having their claims paid. If, as counsel will admit, the liens of their clients continue to attach to this property, even when it passes into the manual possession of the State Court, their position in opposing this application seems to be anomalous to that of the traditional dog in the manger. They certainly cannot be harmed, and the probability is that they, as well as others, would be benefitted in case our position is sustained.

VI.

The claim in counsel's sixth point that this proceeding is collusive has no foundation. Collusion means an arrangement or agreement between two parties for the benefit of one or both. All that can be claimed in this case is that Vosburgh, who was one of the trustees of the corporation, misled one of the plaintiffs in error, not for his (Vosburgh's) advantage but for the advantage of all the creditors, including the plaintiff in error. There

is absolutely no foundation for this claim, and it is unnecessary to waste time upon it.

VII.

It does not seem necessary to spend much time upon the brief allowed to be filed by McCarthy & Berrier, as the same ground which is covered by Mr. Benedict's brief is threshed over. It is interesting to observe, however, that on page 4 of that brief the following propositions are conceded:

"The position taken by the State court through its Receiver we assume to be as follows:

(1) When a petition for the insolvency of The Towing Company was presented to the State Court, it thereby acquired jurisdiction over the subject in controversy.

This is true.

(2) When that Court made an order appointing a temporary Receiver of this corporation, it thereby sequestered the property of the corporation, to the use of all concerned.

This proposition, also, is true."

It seems to us that if these propositions are conceded, our whole case is conceded, and comment is therefore unnecessary.

The statements made upon page 9, in regard to the Holland Trust Company as the mortgagee, and upon page 12 as to the sale of the vessels to the admiralty court, and upon page 23 as to the marshal, of course cannot be considered by this Court, as such facts do not appear in the printed case.

Perhaps that is a sufficient answer to the statement made on pages 11 and 12 in regard to the effect of a mortgage upon these vessels. The mortgagee is not a party here, no claim is made, and it is not necessary therefore to take into account what his title may be. It may be said, however, that the position of the learned counsel, McCarthy & Berrier, on this question is entirely without foundation.

The learned counsel say that the receiver will not be entitled to the possession of these vessels even if his motion be granted because it is alleged that default has been made in the mortgage to the Holland Trust Company and, that, therefore the legal

title is vested in the mortgagee. Under what principle, anyone but the Holland Trust Company can assert this, it is difficult to see. But conceding that it lies in the mouth of the counsel for a libellant to assert such a claim, the claim itself cannot be supported. The case of Leadbeter vs. Leadbeter, 125 N. Y., 290, which counsel relies upon, does not sustain his contention. It does not hold that the mortgage has the legal title before foreclosure, but merely that where a default has been suffered in the conditions of a mortgage, the mortgagor has no interest left which can be sold on execution against him. The case also expressly holds that the Receiver is entitled to the balance of the fund after the mortgage is paid. But the question to be adjudicated here is not the respective title of the mortgagee and the receiver as that is not before this Court. The mortgagee makes no claim, is not a party and such questions cannot be passed upon in these proceedings. Moreover, it is entirely immaterial what title the receiver takes as against the mortgagee. It is perfectly clear under the authorities cited that the state Court to which the mortgagee must look to be put in possession, if it is entitled to such possession, is the only forum which can adjudicate upon that question. See case of E. L. Cain and cases cited. The only question to be decided here is who is entitled to the present custody of these boats, the State Court through its receiver or the United States Court through its marshal.

Moreover, it must be conceded that the libels in question are antecedent to the lien of any chattel mortgage and therefore, the respective rights of the receiver and the prior lienors must of necessity be adjudicated without regard to the rights of the subsequent lienor.

VIII.

The writ of error should be dismissed and the decision of the State Court affirmed.

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